1986 WL 408177 (HL), [1986] 1 All E.R. 129, [1986] 2 W.L.R. 24, (1986) 83 L.S.G. 362, (1986) 136 N.L.J. 15
**(Publication page references are not available for this document.)**

Williams and Humbert Ltd. Respondents v. W. & H. Trade Marks (Jersey) Ltd. Appellants
Rumasa S.A. and Others Respondents v. Multinvest (U.K.) Ltd. and Others Appellants

House of Lords

HL

Lord Scarman, Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman and Lord Mackay of Clashfern

1985 Oct. 2, 3, 7; Dec. 12

Fox and Lloyd L.JJ. and Sir John Megaw

1985 March 4, 5, 6, 7, 8, 11; April 3

Nourse J.

1984 Nov. 19, 20, 21, 22, 23, 26, 27; Dec. 19

Conflict of Laws--Confiscatory or political legislation--Expropriation of shareholdings--Group of Spanish companies owned and controlled by Spanish family--Spanish State acquiring possession and control of companies by expropriatory decrees--Action by English subsidiary to recover trade marks transferred to Jersey company for benefit of Spanish family--Second action by Spanish companies to recover moneys credited to Netherlands Antilles company-- Whether Spanish decrees recognised by English courts--Whether actions constituting indirect enforcement of Spanish decrees

Practice--Pleadings--Striking out--Application involving long and serious argument--Whether appropriate to be heard under application to strike out or as preliminary question of law--R.S.C., Ord. 18, r. 19; Ord. 33, r. 3

[FN1] The plaintiff in the first action, W. & H. Ltd., was an English company controlled by R.S.A., a Spanish company owned until 1983 by M. and members of his family. In 1976 W. & H. Ltd. entered into arrangements whereby trade marks belonging to W. & H. Ltd. were transferred to a Jersey company, for the ultimate benefit of M. and his family, and W. & H. Ltd. were granted licences to use the trade marks terminable without notice in the event, inter alia, of R.S.A.'s shares being expropriated.

FN1 R.S.C., Ord. 18, r. 19: see post, p. 434G-H. Ord. 33, r. 3: see post, p. 436E-F.

The plaintiffs in the second action were R.S.A. and two associated Spanish banks, one of which, at the direction of the other, granted substantial loans during 1982 to companies which credited the money to accounts controlled by M.N.V., a Netherlands Antilles company the shares in which were held to the order of M.

As a result of Spanish expropriatory decrees passed in 1983, the State of Spain became entitled to control directly the affairs of R.S.A. and the two banks and to control indirectly the affairs of W. & H. Ltd., and, by operation of the arrangements made in 1976, the shares in the Jersey company and with them the benefit of the trade marks became held in trust for M. and his family. Thereafter, W. & H. Ltd. brought the first action to set aside the 1976 arrangements and recover the trade marks, and R.S.A. and the two banks commenced the second action, alleging breaches of fiduciary duties by M. and seeking, inter alia, a declaration that the shares in M.N.V. were held in trust for the plaintiffs. The defendants in the first action, the Jersey company, M. and members of his family, amended their defence to allege that the plaintiff was not entitled to any relief by reason of the fact that the proceedings were an attempt to enforce a foreign law which was penal or which otherwise ought not to be enforced by the court. The plaintiff moved to strike out the amendment, pursuant to R.S.C., Ord. 18, r. 19, on the ground that it disclosed no reasonable defence. In the second action the third defendant, M., moved for leave to amend his defence to raise a defence similar to that in

dispute in the first action. The judge rejected the contention that there was a principle of English law that the courts would refuse to recognise foreign laws that purported to confiscate the property of a particular individual or class of individuals. He accepted that English law, while recognising foreign laws which did not discriminate on unacceptable grounds in confiscating property situated within that foreign state, would not enforce them if they were also penal but he held that, even if the Spanish decrees could be so classified, neither action was capable of being a direct or indirect enforcement of the decrees, since the object of the decrees had been achieved by perfection of the state's title in Spain leaving nothing to enforce. In the first action, he ordered that the defence should be struck out and, in the second action, the defendant's application to amend should be dismissed.

The Court of Appeal dismissed the defendants' appeals by a majority, holding that the Spanish decrees formed no part of either cause of action, both of which had existed before the decrees were enacted and which involved merely the enforcement of the plaintiffs' ordinary rights under English law.

On appeal by the defendants: -

Held, dismissing the appeals, (1) that both actions were merely actions by English and Spanish companies to recover property to which, according to the pleadings, they were entitled before the enactment of the Spanish decrees so that the actions did not constitute indirect attempts to enforce those decrees and that the principle that a country could not collect its taxes outside its territories could not be used to frustrate or contradict the principle that the English courts would recognise, without considering the merits, the compulsory acquisition laws of a foreign state and acknowledge the changes of title to property which came under the control of that state together with all its consequences (post, pp. 425E-G, 428F - 429A, 431C-E, 433B-E, 434E-G, 437B, 440G - 441D).

Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532, C.A. and Princess Paley Olga v. Weisz [1929] 1 K.B. 718, C.A. applied.

Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140; Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629; Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 516 and Government of India v. Taylor [1955] A.C. 491 , H.L.(E.) distinguished.

(2) That where an application to strike out a pleading under R.S.C., Ord. 18, r. 19 involved prolonged and serious argument the court should generally decline to proceed with the argument unless it was satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial; that, although the issues raised would more appropriately have been the subjects of applications under Ord. 33, r. 3 for determination of the questions raised before trial of the action, in the circumstances the course of the investigation by the judge and the time involved in the application under Ord. 18, r. 19 had been the same as if the applications had been made under Ord. 33, r. 3; and that, accordingly, the decision to strike out the defence in the first action and to refuse leave to amend in the second action had been rightly made (post, pp. 425E-G, 435H - 436D, F - 437B, 441D-G).

Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, C.A. and McKay v. Essex Area Health Authority [1982] Q.B. 1166, C.A. disapproved in part.

Decision of the Court of Appeal, post, p. 389D; [1985] 3 W.L.R. 501; [1985] 2 All E.R. 619 affirmed.

The following cases are referred to in the opinions of their Lordships:

Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532, C.A..

Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140

Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248; [1952] 2 All E.R.

956, C.A..

Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476; [1971] 2 W.L.R. 791; [1971] 2 All E.R. 98, C.A..

Buchanan (Peter) Ltd. v. McVey (Note) [1955] A.C. 516

Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094 , C.A..

E.B.M. Co. Ltd. v. Dominion Bank [1937] 3 All E.R. 555, P.C..

Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629

Government of India v. Taylor [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292, H.L.(E.).

Hubbuck & Sons Ltd. v. Wilkinson [1899] 1 Q.B. 86, C.A..

King of the Hellenes v. Brostrom (1923) 16 L1.L.Rep. 190

McKay v. Essex Area Health Authority [1982] Q.B. 1166; [1982] 2 W.L.R. 890, [1982] 2 All E.R. 771, C.A..

Oppenheimer v. Cattermole [1976] A.C. 249, [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538, H.L.(E.).

Paley Olga (Princess) v. Weisz [1929] 1 K.B. 718, C.A..

Palicio (F.) y Compania S.A. v. Brush (1966) 256 F.Supp. 481

Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352; [1962] 3 W.L.R. 157; [1962] 2 All E.R. 214

Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22, H.L.(E.).

Zwack v. Kraus Bros. & Co. Inc. (1956) 237 F. 2d 255

The following additional cases were cited in argument in the House of Lords:

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.).

Attorney-General of New Zealand v. Ortiz [1984] A.C. 1; [1982] 3 W.L.R. 570; [1982] 3 All E.R. 432, C.A..

Baccus S.R.L. v. Servicio Nacional del Trigo [1957] 1 Q.B. 438; [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715, C.A..

Banque des Marchands de Moscou (Koupetschevsky), In re [1958] Ch. 182; [1957] 3 W.L.R. 637; [1957] 3 All E.R. 182

Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.).

Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd. [1916] 2 A.C. 307, H.L.(E.).

Glenroy, Part Cargo ex M.V. [1945] A.C. 124, P.C..

Helbert Wagg & Co. Ltd., In re Claim by [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129

Holdsworth (Harold) & Co. (Wakefield) Ltd. v. Caddies [1955] 1 W.L.R. 352; [1955] 1 All E.R. 725, H.L.(Sc.).

Maltina Corporation. v. Cawy Bottling Co. Inc. (1972) 462 F. 2d 1021

Merchandise Transport Ltd. v. British Transport Commission [1962] 2 Q.B. 173; [1961] 3 W.L.R. 1358; [1961] 3 All E.R. 495, C.A..

Russian and English Bank v. Baring Brothers & Co. [1936] A.C. 405; [1936] 1 All E.R. 505 , H.L.(E.).

Westbourne Galleries, In re [1973] A.C. 360; [1972] 2 W.L.R. 1289; [1972] 2 All E.R. 492,

H.L.(E.).

The following cases are referred to in the judgments of the Court of Appeal:

Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532, C.A..

Attorney-General of New Zealand v. Ortiz [1984] A.C. 1; [1982] 3 W.L.R. 570; [1982] 3 All E.R. 432, C.A..

Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co. [1892] 3 Ch. 274, C.A..

Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140

Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476; [1971] 2 W.L.R. 791; [1971] 2 All E.R. 98, C.A..

Buchanan (Peter) Ltd. v. McVey (Note) [1955] A.C. 516

Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094 , C.A..

Dyson v. Attorney-General [1911] 1 K.B. 410, C.A..

E.B.M. Co. Ltd. v. Dominion Bank [1937] 3 All E.R. 555, P.C..

Folliott v. Ogden (1789) 1 H. Bl. 124

Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629

Government of India v. Taylor [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292, H.L.(E.).

Huntington v. Attrill [1893] A.C. 150, P.C.

Jones v. Lipman [1962] 1 W.L.R. 832; [1962] 1 All E.R. 442

McKay v. Essex Area Health Authority [1982] Q.B. 1166; [1982] 2 W.L.R. 890; [1982] 2 All E.R. 771, C.A..

Metropolitan Bank Ltd. v. Pooley (1885) 10 App. Cas. 210, H.L.(E.).

Nagle v. Feilden [1966] 2 Q.B. 633; [1966] 2 W.L.R. 1027; [1966] 1 All E.R. 689 , C.A..

Oppenheimer v. Cattermole [1976] A.C. 249; [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538, H.L.(E.).

Paley Olga (Princess) v. Weisz [1929] 1 K.B. 718, C.A..

Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, C.A..

Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149; [1969] 2 W.L.R. 337; [1969] 1 All E.R. 904, C.A..

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.).

Woolfson v. Strathclyde Regional Council (1979) 38 P. &; C.R. 521, H.L. (Sc.).

Zwack v. Kraus Bros. & Co. Inc. (1956) 237 F. 2d 255

The following additional cases were cited in argument in the Court of Appeal:

Abbey, Malvern Wells Ltd., The v. Ministry of Local Government and Planning [1951] Ch. 728; [1951] 2 All E.R. 154

Ayerst v. C. & K. (Construction) Ltd. [1976] A.C. 167; [1975] 3 W.L.R. 16; [1975] 2 All E.R. 537, H.L.(E.).

Banco de Bilbao v. Sancha [1938] 2 K.B. 176; [1938] 2 All E.R. 253, C.A..

Bank of Ethiopia v. National Bank of Egypt [1937] Ch. 513; [1937] 3 All E.R. 8

Bank voor Handel en Scheepvaart N.V. v.

Slatford [1953] 1 Q.B. 248; [1952] 2 All E.R. 956, C.A..

Brown, Gow, Wilson v. Beleggings-Societeit N.V. (1961) 29 D.L.R. (2d) 673

Buttes Gas and Oil Co. v. Hammer (No. 3) [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.).

Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1964] R.P.C. 299; [1967] 1 A.C. 853 ; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.).

Compania Ron Bacardi S.A. v. Bank of Nova Scotia (1961) 193 F. Supp. 814

Dimbleby & Sons Ltd. v. National Union of Journalists [1984] 1 W.L.R. 427; [1984] I.C.R. 386; [1984] 1 All E.R. 751, H.L.(E.).

Helbert Wagg & Co. Ltd., In re Claim by [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129

Industria Azucarera Nacional S.A. v. Empresa Exportadora de Azucar (Cubazucar) (unreported), 29 February 1980, Mustill J.

Maltina Corporation v. Cawy Bottling Co. Inc. (1972) 462 F. 2d 1021

Novello & Co. Ltd. v. Hinrichsen Edition Ltd. [1951] Ch. 595; [1951] 1 All E.R. 779

Palicio (F.) y Compania S.A. v. Brush (1966) 256 F. Supp. 481

Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, C.A..

Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352; [1962] 3 W.L.R. 157; [1962] 2 All E.R. 214

Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse [1925] A.C. 112, H.L.(E.).

Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22, H.L.(E.).

Tabacalera Severiano Jorge S.A. v. Standard Cigar Co. (1968) 392 F. 2d 706

Trevor v. Whitworth (1887) 12 App.Cas. 409, H.L.(E.).

United Bank Ltd. v. Cosmic International Inc. (1976) 542 F. 2d 868

The following cases are referred to in the judgment of Nourse J.:

Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532, C.A..

Anglo-Iranian Oil Co. Ltd. v. Jaffrate (The Rose Mary) [1953] 1 W.L.R. 246

Attorney-General of New Zealand v. Ortiz [1984] A.C. 1; [1982] 3 W.L.R. 570; [1982] 3 All E.R. 432, C.A..

Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140

Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248; [1951] 2 All E.R.779

Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476; [1971] 2 W.L.R. 791; [1971] 2 All E.R. 98, C.A..

Buchanan (Peter) Ltd. v. McVey (Note) [1955] A.C. 516

Buttes Gas and Oil Co. v. Hammer (No. 3) [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.).

Cable (Lord), decd., In re [1977] 1 W.L.R. 7; [1976] 3 All E.R. 417

Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629

Fried Krupp Actien-Gesellschaft, In re [1917] 2 Ch. 188

Government of India v. Taylor [1955] A.C.

491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292, H.L.(E.).

Helbert Wagg & Co. Ltd., In re Claim by [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129

Industria Azucarera Nacional S.A. v Empresa Exportadora Azucar (Cubazucar) (unreported), 29 February 1980, Mustill J.

Novello & Co. Ltd. v. Hinrichsen Edition Ltd. [1951] Ch. 595; [1951] 1 All E.R. 779

Oppenheimer v. Cattermole [1976] A.C. 249; [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538, H.L.(E.).

Paley Olga (Princess) v. Weisz [1929] 1 K.B. 718, C.A..

Regazzoni v. K. C. Sethia (1944) Ltd. [1958] A.C. 301; [1957] 3 W.L.R. 752; [1957] 3 All E.R. 286, H.L.(E.).

Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352; [1962] 3 W.L.R. 157; [1962] 2 All E.R. 214

Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22, H.L.(E.).

Wolff v. Oxholm (1817) 6 M. & ; S. 92

The following additional cases were cited in argument before Nourse J.:

A/S Tallinna Laevauhisus v. Estonian State Steamship Line (1946) 80 Ll. L.Rep. 99, C.A..

Banco de Bilbao v. Sancha [1938] 2 K.B. 176; [1938] 2 All E.R. 253, C.A..

Bank of Ethiopia v. National Bank of Egypt [1937] Ch. 513; [1937] 3 All E.R. 8

Banque des Marchands de Moscou (Koupetschesky), In re [1958] Ch. 182; [1957] 3 W.L.R. 637; [1957] 3 All E.R. 182

Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd. [1916] 2 A.C. 307, H.L.(E.).

Dimbleby & Sons Ltd. v. National Union of Journalists [1984] 1 W.L.R. 427; [1984] I.C.R. 386; [1984] 1 All E.R. 751, H.L.(E.).

Folliott v. Ogden (1789) 1 H.Bl. 124; (1792) 4 Bro. Parl. Cas. 111, H.L.(E.).

Hall v. Levy (1875) L.R. 10 C.P. 154

Huntington v. Attrill [1893] A.C. 150, P.C..

Kahler v. Midland Bank Ltd. [1950] A.C. 24; [1949] 2 All E.R. 621, H.L. (E.).

Kaufman v. Gerson [1904] 1 K.B. 591, C.A..

Lorentzen v. Lydden & Co. Ltd. [1942] 2 K.B. 202

Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, C.A..

Quinn v. Leathem [1901] A.C. 495, H.L.(I.)

Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse [1925] A.C. 112, H.L.(E.).

Schemmer v. Property Resources Ltd. [1975] Ch. 273; [1974] 3 W.L.R. 406; [1974] 3 All E.R. 451

Woolfson v. Strathclyde Regional Council (1978) 38 P. &; C.R. 521, H.L. (Sc.).

MOTIONS

By writ dated 20 June 1983 and an amended statement of claim, the plaintiffs, Williams and Humbert Ltd., sought against the defendants, W. & H. Trade Marks (Jersey) Ltd., Jose Maria Ruiz-Mateos, Zoilo Ruiz-Mateos, Rafael Ruiz-Mateos, Isidoro Ruiz-Mateos, Alfonso Ruiz-Mateos and Dolores Ruiz-Mateos, inter alia, (1) a declaration that certain agreements were void and unenforceable by the first defendant; (2) in the alternative, (a) a declaration that the agreements were liable to be avoided at the

option of the plaintiffs and (b) rescission of the agreements; (3) delivery up of the agreements for cancellation and of all documents in the possession custody or power of the defendants relating to the "Dry Sack" trade marks; (4) a declaration that the plaintiffs were solely entitled to the benefit of the registered trade marks; (5) rectification of the register of trade marks by removing therefrom the name of the first defendants as proprietors of the trade marks and substituting therefor the name of the plaintiffs; (6) a mandatory injunction ordering the defendants to do all acts and things and execute and sign all deeds and documents required by the plaintiffs to enable them to be registered as proprietor of the trade marks; and (7) against the second defendant, damages. In their amended defence the defendants claimed, inter alia, by paragraph 6(e) that the plaintiffs were not entitled to the relief sought or any relief "by reason of the fact that these proceedings represent an attempt to enforce a foreign law which is penal or which otherwise ought not to be enforced by this court, and further or alternatively that it would be contrary to public policy to grant the relief sought or any relief." It was further alleged that the plaintiffs were "not seeking to enforce their own rights but rather those purportedly acquired by the State of Spain under its Decree Law of 23 February 1983 and the law of 29 June 1983;" and that those laws were discriminatory, being "directed specifically and exclusively at the Rumasa Group and the Mateos family." By notice of motion date 1 October 1984 the plaintiffs sought an order, pursuant to R.S.C., Ord. 18, r. 19 and/or the court's inherent jurisdiction, striking out paragraph 6(e) of the amended defence, as either disclosing no reasonable cause of defence and/or being frivolous or vexatious and/or tending to prejudice embarrass or delay the fair trial of the action.

By writ dated 15 March 1983, the plaintiffs in the second action, Rumasa S.A., Banco de Jerez S.A. and Banco del Norte S.A., sought against the defendants, Multinvest (U.K.) Ltd., Carlos Quintas and Jose Maria Ruiz-Mateos, inter alia, (1) an order that the defendants disclose all documents, deeds, instruments, writings, files, papers, microfilms and any other record in the possession, custody or power of the defendants relating to (a) the business or past business of Multinvest (U.K.) Ltd. and (b) the business or past business of any company known by the defendants to have been owned directly or indirectly by or under the control or direction of the third defendant or Rumasa S.A., and that the defendants permit the plaintiffs to inspect and take copies thereof; (2) injunctions to restrain the defendants from parting with possession, custody or power (otherwise than to the plaintiffs) or hiding, defacing, altering or destroying any such document, deed, instrument, writing, file, paper, microfilm or other record; (3) a declaration that the second defendant held bearer shares in specified companies on trust for the plaintiffs or one or other of them absolutely; (4) an order appointing a receiver for the bearer shares; and (5) an order requiring the second defendant to deliver the bearer shares to the receiver so appointed. By amendment Multinvest N.V. was added as a defendant. The third defendant applied to amend his defence to include a defence similar to that in paragraph 6(e) of the amended defence in the first action.

The facts are stated in the judgments of Nourse J. and Fox L.J.

Representation

C. A. Brodie Q. C., Alan Steinfeld and Daniel Gerrans for the plaintiffs in both actions.

Robert Reid Q.C. and Simon Berry for the defendants in the first action.

Robert Reid Q. C. and W. R. Stewart-Smith for the third defendant in the second action.

Cur. adv. vult.

19 December 1984. NOURSE J.

read the following judgment. These are interlocutory applications in two related actions in each of which it is sought to raise the defence that the proceedings are an

attempt to enforce foreign expropriatory laws which either ought not to be recognised or ought not to be enforced in England. The plaintiffs say that that defence is bound to fail and ought to be disallowed at this stage.

The plaintiff in the first action, which is known as the trade marks action, is an English company called Williams and Humbert Ltd. ("Williams and Humbert "). The first defendant is a Jersey company called W & H. Trade Marks (Jersey) Ltd. ("W. & H (Jersey)"). The second defendant is Jose Maria Ruiz-Mateos ("Mateos"). The other five defendants are his four brothers and a sister.

In the second action, which is known as the Multinvest action, the plaintiffs are three Spanish companies called Rumasa S.A. ("Rumasa"), Banco de Jerez S.A. ("Jerez") and Banco del Norte S.A. ("Norte"). The first defendant is an English company called Multinvest (U.K.) Ltd. ("Multinvest U.K."); the second defendant is Carlos Quintas ("Quintas"); the third defendant is Mateos; and the fourth defendant is a Netherlands Antilles company called Multinvest N.V.

Williams and Humbert was incorporated in 1942 to acquire the business of sherry and port shippers, agents, merchants, and dealers which had been carried on by the firm of that name since about 1877. One of its best known activities has for many years been the shipping and marketing of Dry Sack sherry and it has long been the registered proprietor and absolutely entitled to the benefit of the trade marks in that name. In 1972 Rumasa, in which company Mateos was then the beneficial owner of 50 per cent. of the issued share capital and his brothers and sister the beneficial owners of 10 per cent. each, acquired the entire issued share capital of the holding company of Williams and Humbert and thus became entitled to control its affairs. Mateos was effectively the controller of Rumasa. That company was also the beneficial owner of 69.86 per cent. and 99.99 per cent. of the share capitals of Jerez and Norte respectively.

At the end of 1975 and the beginning of 1976 certain arrangements were, at the direction of Mateos and with the consent of his family, made in regard to the Dry Sack trade marks. It may be no coincidence that that took place during the period of political uncertainty in Spain which followed the death of General Franco in November 1975. The arrangements included (1) the incorporation of W. & H. (Jersey), whose principal object was the holding and exploitation of trade marks and whose entire issued share capital was registered in the names of nominees in trust for a Jersey trust company; (2) the execution of an agreement under seal dated 25 February 1976, known as the master agreement, and made between Williams and Humbert and W. & H. (Jersey), by which the trade marks and the goodwill connected therewith were agreed to be assigned to W. & H. (Jersey) and by which, as varied by a supplemental agreement under seal dated 11 October 1980, W. & H. (Jersey) agreed to grant back to Williams and Humbert licences to use the trade marks upon terms whereby W. & H. (Jersey) had the right to terminate the licences summarily without notice if, amongst other things, the whole or any part of the issued share capital or the undertaking, property or assets of Rumasa, or of any subsidiary of Rumasa for the time being holding any shares in Williams and Humbert, should be confiscated, expropriated, sequestrated or compulsorily acquired or threatened by any such action; and (3) the execution of a trust deed dated 27 February 1976 and made between the trust company, Mateos and one of his brothers, whereby, amongst other things, the trust company declared that it held the shares in W. & H. (Jersey) upon certain trusts for the benefit of Mateos and his brothers and sister and their descendants, subject to a proviso that in the event of confiscation or the like the shares were to be held for the beneficiaries absolutely. Those arrangements were duly carried into effect and were completed by the end of 1980.

On 23 February 1983 there came into force in Spain Royal Decree Law 2/83 ("the Decree Law") whose expressed effect was, first, that all shares representing the capital of the 230-odd Spanish companies in the Rumasa group

(including Rumasa itself and Jerez and Norte and 21 other banks) should be forcibly expropriated and, secondly, that the State of Spain should take immediate possession of the expropriated companies and acquire complete control of their shares by operation of law, and so that the taking of possession should involve assumption of all the powers of company operation. On 29 June 1983 there came into force in Spain Law 7/1983 ("the New Law") whose effect was to replace and amend the Decree Law. I need not go into detail. So far as material for present purposes, its effect was much the same. The validity of the Decree Law has been unsuccessfully challenged in the Constitutional Court of Spain. An application to challenge the validity of the New Law is still pending, but it is agreed that I must proceed on the footing that its validity will be upheld.

So far as material, the practical results of the expropriation were, first, that the shares in W. & H. (Jersey) and with them the benefit of the Dry Sack trade marks became held in trust for the beneficiaries under the 1976 trust deed absolutely and, secondly, that in place of Mateos and his family the State of Spain became directly entitled to control the affairs of Rumasa and the two banks and indirectly entitled to control the affairs of Williams and Humbert. If the arrangements which were made in 1975 and 1976 were valid then it is evident that Williams and Humbert can no longer take any benefit from the exploitation of the valuable trade marks which are now held exclusively for the benefit of Mateos and his family. Before 23 February 1983 there would have been no incentive for Williams and Humbert to question the validity of those arrangements, since that company was effectively owned by Mateos and his family. All that has now changed. The State of Spain has caused Williams and Humbert to commence the trade marks action in which the relief claimed is, shortly stated, (1) a declaration that the 1975 and 1976 arrangements were ultra vires Williams and Humbert as involving a gratuitous disposition of its assets made for the benefit not of itself but of Mateos and his family, alternatively were an unauthorised reduction of its capital, and that they are in any event void and unenforceable by W. & H. (Jersey); alternatively, (2) a declaration that the arrangements were entered into, to the knowledge of W. & H. (Jersey), in breach of the fiduciary duties owed to it by the directors of Williams and Humbert and rescission of the arrangements; (3) relief consequential to (1) and (2); and (4) damages against Mateos. A comprehensive amended defence in the action has been served. I am only concerned with the defence mentioned at the beginning of this judgment which Williams and Humbert seeks to have struck out on the ground that it discloses no reasonable cause of defence.

I now turn to the Multinvest action. The managing director of Multinvest U.K. has at all material times been Quintas. The registered holder and the beneficial owner of its entire issued share capital has at all material times been Multinvest N.V. Before 23 February 1983 the entire issued share capital of Multinvest N.V., which are bearer shares, was held to the order and at the direction of Mateos. Rumasa claims that it has at all material times been the beneficial owner of the shares in Multinvest N.V., alternatively that they were wholly or partially purchased with moneys belonging to the banks and were therefore held by Quintas and Mateos or one of them as constructive trustees for Jerez and Norte. These claims are denied by Mateos. During the year 1982, Jerez, on the instructions of Norte, made loans totalling about U.S. $46 million or the equivalent to various puppet companies, most of them incorporated in Panama and the others in Argentina, Ecuador, Liechtenstein and England. None of these companies took any benefit from the loans. They all gave instructions for the loans to be credited or transferred to accounts in the name or under the control of Multinvest N.V. The State of Spain has now caused Rumasa, Jerez and Norte to commence the Multinvest action, in which it is alleged that Mateos acted in breach of his fiduciary duties to the plaintiffs and that Quintas and Multinvest U.K. became involved in such breaches. The relief claimed includes orders for disclosure of all material documents and information, injunctions, a

declaration that the shares in Multinvest N.V. and also the shares in the puppet companies and two others are held in trust for the plaintiffs, the appointment of a receiver and damges against Mateos. A receiver was appointed on 15 March 1983 and he is now in possession of the bearer shares in Multinvest N.V. Neither Multinvest U.K., Quintas nor Multinvest N.V. has entered an acknowledgment of service. Mateos has put in a comprehensive defence, but now seeks leave to amend in order to raise the defence mentioned at the beginning of this judgment. Leave is opposed by the plaintiffs on the like ground as before.

Shortly stated, the defendants' contention is that the Decree Law and the New Law are expropriatory laws which either ought not to be recognised or ought not to be enforced in England; and that, since the State of Spain is indirectly the beneficial owner of the shares in Williams and Humbert and directly the beneficial owner of the shares in Rumasa, Jerez and Norte, these actions are indirect attempts to enforce those laws over here and cannot succeed. The plaintiffs' objective in seeking to have that defence disallowed at this stage is to save time and expense, in particular to avoid the investigation of various questions of Spanish law at trial. They are also unwilling that this court should become the forum for the discussion of any question of Spanish domestic policy. The case has been thoroughly and conscientiously argued, with an exhaustive citation of authority.

The extent to which English law will recognise and enforce foreign expropriatory laws has been explored in a series of reported cases dating from the first world war. The whole subject was examined by Upjohn J. in In re Claim by Helbert Wagg & Co. Ltd. [1956] Ch. 323. Since then there have been significant further developments. The questions which arise in the present case require me to summarise the effect of the authorities as they now stand.

Mr. Brodie, who appears for the plaintiffs in both actions, has divided those foreign laws which English law either will not recognise or will not enforce into two classes. First, there are laws which are not recognised at all and are, by a legal fiction, deemed not to exist. Secondly, there are laws whose validity and effect within the territory of the foreign state are recognised but which will not be directly or indirectly enforced in England. It was probably not until the decision of the House of Lords in Oppenheimer v. Cattermole [1976] A.C. 249 that the distinction fully emerged and some of the earlier cases cannot be confidently assigned to one class or the other. In many cases the distinction is not of practical importance, but in others it may be: compare Regazzoni v. K. C. Sethia (1944) Ltd. [1958] A.C. 301. Moreover, it does have the merit of segregating those foreign laws which English law abhors from those which it merely declines, on grounds of public policy, to enforce. The classification has proved a valuable aid to analysis in the present case and I gladly adopt it.

I am not concerned with penal or revenue laws simpliciter. I confine myself to expropriatory laws of duly recognised states, principally to confiscatory laws, that is to say, expropriatory laws which do not provide for payment of any or any proper compensation. In this regard the existing authorities appear to me to support the following propositions.

(1A) English law will not recognise foreign confiscatory laws which, by reason of their being discriminatory on grounds of race, religion or the like, constitute so grave an infringement of human rights that they ought not to be recognised as laws at all: see Oppenheimer v. Cattermole [1976] A.C. 249. These are class I laws.

(1B) English law will not recognise foreign laws which discriminate against nationals of this country in time of war by purporting to confiscate their movable property situated in the foreign state: see Wolff v. Oxholm (1817) 6 M. & S. 92; In re Fried Krupp Actien-Gesellschaft [1917] 2 Ch. 188 and In re Claim by Helbert Wagg & Co. Ltd. [1956] Ch. 323, 345. These are also class I laws.

(2A) English law, while recognising foreign

laws not falling within class I which confiscate property situated in the foreign state - see (3) below - will not directly or indirectly enforce them here if they are also penal: see Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140, in some respects a puzzling case which has sometimes been misunderstood. These are class II laws.

(2B) English law will not enforce foreign laws which purport to confiscate property situated in this country: see Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629 and Novello & Co. Ltd. v. Hinrichsen Edition Ltd. [1951] Ch. 595. This can now be seen to be an application of the wider rule that English law will not enforce foreign laws which purport to have extra-territorial effect: see Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248. Thus the rule would just as much apply to expropriatory laws which provided for payment of proper compensation: see Oppenheimer v. Cattermole [1976] A.C. 249, 276, per Lord Cross of Chelsea. All these are class II laws, although the first two cases cited might now be decided on the ground that the laws there in question were class I laws falling within category (1A).

(3) English law will recognise foreign laws not falling within class I which confiscate property situated in the foreign state and, where title is perfected there, will enforce its incidents in this country: see Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532; Princess Paley Olga v. Weisz [1929] 1 K.B. 718 and Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629, 644. The nationality of the owner is immaterial: see In re Claim by Helbert Wagg & Co. Ltd. [1956] Ch. 323, 348-349.

In In re Claim by Helbert Wagg & Co. Ltd. Upjohn J., obiter, expressed the following view, at p. 346, which, if correct, would establish the existence of a third category of class I laws of crucial importance in the present case:

"English courts will not recognise the validity of foreign legislation aimed at confiscating the property of particular individuals or classes of individuals; Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140 which treated the Spanish laws purporting to expropriate the ex-King of Spain's property as examples of penal legislation; and see Anglo-Iranian Oil Co. Ltd. v. Jaffrate (The Rose Mary) [1953] 1 W.L.R. 246 where Campbell J., sitting in the Supreme Court of Aden, held certain laws of the State of Persia which he found to be passed to nationalise the plaintiff company only without compensation were confiscatory and ineffectual to pass title."

With the greatest of respect to Upjohn J., I do not think that either of the cases cited is authority for the proposition stated. He seems to have thought that in Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140 the Spanish laws were treated as penal by reason of their having been aimed at confiscating property of a particular individual, whereas the true view is that they were in fact penal by reason of their having not only confiscated the ex-King's property but also declared him to be guilty of high treason and an outlaw: see [1935] 1 K.B. 140, 144, where Lawrence J. said:

"But in the present case the penalty imposed is seizure by the state for its own benefit of all the defendant's properties, rights, and grounds of action, and this penalty is imposed in terms for high treason..."

There is no indication anywhere in the report that the case was decided on the other ground. As for The Rose Mary [1953] 1 W.L.R. 246, it is true that the Persian law which was there in question had been passed to nationalise the plaintiff company only without compensation: see The Rose Mary case [1953] 1 W.L.R. 246, 251-252. However, there is again no indication that it was on that ground that the case was decided. It was decided on the ground that the general rule of enforcement in category (3) cases does not apply where the owner of the property is not a national of the confiscating state.

While I have already indicated my entire agreement with Upjohn J. that the actual

ground of decision cannot be supported, I am equally unable to support it on the ground suggested by him. Not only is the proposition not supported by any other authority, I think that it is also contrary to the authorities which do exist. Thus, it clearly appears from the speeches in the House of Lords in Oppenheimer v. Cattermole [1976] A.C. 249 that a category (1A) law is a very great rarity. Although Lord Hodson, Lord Cross of Chelsea and Lord Salmon thought that the Nazi law there in question was such a law, Lord Hailsham of St. Marylebone preferred to express no concluded opinion upon the point and Lord Pearson was of the view that there could be no such thing. As Lord Salmon pointed out, the barbarity of much of the Nazi legislation was happily unique. Turning to category (1B) laws, I would accept that these may not be equally rare but their existence nevertheless depends on the grave and special circumstance of there being a state of war between this country and some other.

Neither the rarity of the first category nor the gravity of the second lends any credence to the view that there exists a third, based, not on discrimination on grounds of race, religion or the like or against English nationals in time of war, but on the confiscation of the property of a particular individual or class of individuals and no more. Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. [1921] 3 K.B. 532 clearly established that English law will recognise foreign confiscatory laws having general, as distinct from particular, effect. Further, there is one authority, Princess Paley Olga v. Weisz [1929] 1 K.B. 718 which seems to be directly against the existence of a third category of class I laws. In that case the English court did recognise a foreign law or act of state which confiscated the property of a particular individual. Doubtless the seizure of the Paley Palace and its contents was only one example of many confiscatory acts which were perpetrated in the Russia of early 1918: see the evidence quoted by Sankey L.J., at p. 728. And so it might be said that there was a scheme of confiscation directed against property owners in general. But I think it very strange, if the third category does exist, that there should have been no hint of it in that case. The true view is that if it does not operate by reference to unacceptable criteria there is nothing so inherently abhorrent in selective confiscation in peacetime as to warrant the fiction that the foreign law does not exist. There is an illuminating passage in the judgment of Mustill J. in Industria Azucarera Nacional S.A. v. Empresa Exportadora Azucar (Cubazucar) (unreported), 29 February 1980, under the subheading "Penal and discriminatory," which is to much the same effect.

It is only after much thought and with great hesitation that I differ from a view expressed by so eminent a judge as Upjohn J. in a judgment which has been consistently approved in later cases. The likely explanation appears elsewhere in the report. While there is no other reference to Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140, the proposition itself and the judge's view of The Rose Mary [1953] 1 W.L.R. 246 were evidently taken from the argument of counsel for the administrator of German enemy property: see In re Claim by Helbert Wagg & Co. Ltd. [1956] Ch. 323, 334-335. But the report of that argument does not identify any other authority which could support the proposition.

In my judgment, the proposition that English law will not recognise foreign laws which do not already fall within categories (1A) or (1B) but which purport to confiscate the property of particular individuals or classes of individuals is not supported by the existing authorities, and is contrary to such principles as can be extracted from them. I hold that no such category of class I laws exists.

I now come to the arguments which were advanced in the present case. Mr. Reid, who appears for the defendants in both actions, submitted, first, that on the basis of the facts pleaded or to be pleaded in the two defences, which I must of course assume to be true, the Decree Law and the New Law are capable of being class I laws. If that defence were to succeed at trial it would be an end of both actions. The court, being bound to ignore the

two laws, would hold that Mateos and his family retained the shares in and control of Rumasa and the two banks, and that the State of Spain had no power to cause the actions to be brought. The views above expressed preclude Mr. Reid from relying merely on the fact that the laws confiscated the property of five particular individuals. In order to make the submission good he must establish that they are capable of being held to be discriminatory on unacceptable grounds and thus constitute so grave an infringement of human rights that they ought not to be recognised as laws at all. I will refer to the pleadings presently. However liberally they are interpreted in favour of the defendants, the criticisms which are made get nowhere near establishing that the Decree Law and the New Law are capable of falling within category (1A). I am in no doubt that Mr. Reid's first submission is bound to fail.

Mr. Reid's alternative submission was that on the above basis the two laws are capable of being class II laws; that is to say, laws whose validity and effect in Spain will be recognised but which will not be directly or indirectly enforced in England.

The basic allegation pleaded or to be pleaded in the defences is that the two actions represent attempts to enforce foreign laws which are penal or which otherwise ought not to be enforced by the court; further or alternatively, that it would be contrary to public policy to grant the relief sought or any relief. In support of that allegation reliance is placed on certain facts and matters which can be summarised as follows. First, it is said that in substance the plaintiffs are not seeking to enforce their own rights but rather those purportedly acquired by the State of Spain under the two laws. That is then elaborated in certain respects. There is a particular allegation in the Multinvest defence to which I will return later. Secondly, as to the laws being penal or otherwise laws which ought not to be enforced, it is said that their purpose was not reparation to one aggrieved but vindication of the public justice, that they were directed specifically and exclusively at the Rumasa group and Mateos and his family and, no use having been made of the general law of compulsory expropriation, they were therefore discriminatory; that they provided for immediate possession which was taken peremptorily by force with armed police support; that, no inventory having been prepared and Mateos and his family having been denied access to all relevant records etc., any opposition to the expropriation was rendered practically impossible, and that on that and another ground the agreement of compensation has been rendered substantially difficult, such as to amount to an injustice; that the two laws specifically excluded a right of reversion, specifically set up a procedure and code in respect of compensation different from and more disadvantageous than that which would have obtained under the general law and allowed the disposal of substantial and important parts of the Rumasa group before compensation had been agreed, thus adding to the injustice and tending to render any right to compensation illusory; and that the taking of possession peremptorily and the failure to take an inventory had the effect of facilitating prosecutions being or intended to be brought in Spain against Mateos for alleged offences concerning, inter alia, Spanish revenue and exchange control regulations. Thirdly, as to public policy, reliance is again placed on the facts and matters secondly relied on, in particular on the fact that the two laws were purportedly confiscatory and discriminatory.

The foreign laws which English law will recognise but will not directly or indirectly enforce, other than those in (2B) above, are usually divided into three categories: penal laws, revenue laws and other public laws: see, for example, Dicey & Morris, The Conflict of Laws, 10th ed. (1980), vol. 1, p. 89. The nature and extent of the three categories were recently considered by the Court of Appeal in Attorney-General of New Zealand v. Ortiz [1984] A.C. 1 where a New Zealand Act made it a criminal offence to remove or attempt to remove from New Zealand without permission any historic article knowing it to be such and also provided for the forfeiture of any such article knowingly exported or attempted to be exported. All the members of the court agreed

that the Act could not be enforced in England, but their reasoning was not uniform. Ackner and O'Connor L.JJ., at pp. 34 and 35, thought that it was a penal law. Lord Denning M.R., on the other hand, was of the opinion, at p. 24, that if any country should have legislation prohibiting the export of works of art, and providing for the automatic forfeiture of them to the state should they be exported, then that fell into the category of "public laws " which would not be enforced "because it is an act done in the exercise of Sovereign authority which will not be enforced outside its own territory." The House of Lords, having decided the case on another ground, expressed no conclusion on the correctness or otherwise of the opinions expressed in the Court of Appeal on this point: see p. 46.

There must be a real possibility, perhaps a probability, that the present cases would be held at trial to be concluded against the defendants on this point by the Luther case [1921] 3 K.B. 532 and Princess Paley Olga v. Weisz [1929] 1 K.B. 718. Be that as it may, in the light of the views expressed in the Court of Appeal in Attorney-General of New Zealand v. Ortiz [1984] A.C. 1, in particular those of Lord Denning M.R., Mr. Brodie, while keeping the point open for consideration at a higher level, accepted that he could not in this court submit that the Decree Law and the New Law were incapable of being "other public laws," although he would, I think, have submitted that they were incapable of being penal in the correct sense of meaning laws imposing penalties recoverable by the state. However, he submitted that, even if that question is assumed against him at this stage, each of these actions is nevertheless incapable of being a direct or indirect enforcement of the laws. It is to that question that I now turn.

Although this is manifestly not a case of direct enforcement, it is convenient to start from that point. The leading case on direct enforcement of foreign revenue laws is Government of India v. Taylor [1955] A.C. 491 , where the plaintiff unsuccessfully sought to prove in the liquidation of a United Kingdom company for a sum due in respect of Indian taxes. It was a case of direct enforcement, first, because it was the foreign state which sued and, secondly, because it sued for the amount of the unpaid taxes. It seems that if either of those features is absent the case is at best one of indirect enforcement.

I was referred to a number of cases on indirect enforcement. In Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140 the argument that the plaintiff bank was only enforcing its own contractual rights against the English bank with which the ex-King's securities had been deposited was rejected. It was held that it was in substance enforcing the rights of the Spanish Republic. That was a case of indirect enforcement because it was not the foreign state which sued but the plaintiff bank on its behalf. In the Irish case of Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 516, which was approved by Lord Keith of Avonholm in Government of India v. Taylor [1955] A.C. 491 , 510, it was held that the liquidator of a Scottish company whose only creditor was the United Kingdom revenue could not enforce a money claim against an ex-director of the company in Ireland, on the ground that the sole object of the liquidation was to collect a Scottish revenue debt. That was an indirect enforcement because it was not the foreign state which sued, and perhaps also because the amount recovered would only have gone to satisfy the revenue debt after payment of the liquidator's costs and expenses. In Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352 it was held that the defendant could not be allowed to set up in diminution or extinction of the plaintiff's claim a garnishee order served upon it by the Egyptian revenue. That was a case of indirect enforcement because the foreign state was not itself a party to the proceedings. In Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476 it was held that a claim to goods situated in England which was made by the Government of the United States and founded on a notice of levy in respect of unpaid tax could not be enforced in England. That was a case of indirect enforcement because, although it was the foreign state which sued, it did not sue for the amount of the unpaid tax but for seizure of the goods: see p. 483, per Lord Denning M.R. Finally, in In

re Lord Cable, decd. [1977] 1 W.L.R. 7, 14, Slade J. refused to allow the Union of India to be joined as a party to proceedings in which it was sought to prevent trustees from remitting funds to India in order to pay estate duty there, its only interest being to argue that the trustees should be allowed to take that course. That was a case of indirect enforcement because, although it was the foreign state which applied to be joined to the proceedings, it could not have recovered the funds direct.

Both Mr. Reid and Mr. Berry, who appears with him for the defendants in the trade marks action, relied strongly on a passage in the judgment of Kingsmill Moore J. in Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 516, 529, which was quoted by McNair J. in Rossano v. Manufacturers Life Insurance Co. [1963] 2 Q.B. 352, 377, the latter decision being referred to with approval in Brokaw v. Seatrain U. K. Ltd. [1971] 2 Q.B. 476, 482. The passage reads [1955] A.C. 516, 529:

"If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign state or the representative of a foreign state or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. Mr. Wilson has pressed upon me the difficulty of deciding such a question of fact and has relied on 'ratio ruentis acervi'. For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction."

Adapting that passage to the present case, Mr. Reid submitted that if the substance of the claims made in the present actions is scrutinised it appears that they are really brought for the purpose of acquiring assets for the State of Spain and are therefore an indirect enforcement of the laws by which it acquired the shares in Rumasa and the two banks. In the Multinvest action both Mr. Reid and Mr. Stewart-Smith, who appears with him for the third defendant in that action, laid great emphasis on the particular allegation to which I have earlier referred but which I have yet to state. It is that, by virtue of the acquisition of their shares and the vesting of control of them in organs of the Spanish State, Rumasa and the two banks have in substance become organs of the state.

In order to judge whether either of these actions is capable of being an indirect enforcement of the two laws it is necessary to start by observing that their object, so far as material, was to acquire direct ownership and control of Rumasa and the two banks and indirect ownership and control of Williams and Humbert. That object has been duly achieved by perfection of the state's title in Spain. Accordingly, on a simple but compelling view of the matter there is nothing left to enforce. This consideration distinguishes the present case from all the others on indirect enforcement of penal or revenue laws. Thus, in Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140 the object of the Spanish law, so far as material, was to acquire possession of the ex-King's securities. That object had not been achieved in Spain and could only be achieved by invoking the assistance of the English court. Equally, in each of the four revenue cases the object of the foreign law was to exact payment of a tax or to seize goods in satisfaction thereof. That object had not been achieved in the foreign state and could only be achieved by invoking the assistance of the Irish or English court. This simple view of the matter, although enough to dispose of the point in favour of the plaintiffs in both actions, is confirmed by the fact that the rights, if any, which are asserted by the plaintiffs in each action are independent rights to recover their own assets which arose before the coming into effect of the two laws and were not affected thereby. It may not be a pure pleading point to observe that in neither action is it necessary for the plaintiffs to plead the existence, far less the effect, of the laws.

Mr. Reid submitted that the object of the two laws, so far as material, was to swell the treasury of the State of Spain by getting in the assets claimed in the two actions. I disagree. That may have been part of the motive behind their enactment, but that cannot characterise an action which would have that result as one which indirectly enforces them. Furthermore, Mr. Reid would here encounter the objection that he cannot maintain this submission without piercing the corporate veil, at all events under English law. I must at this stage deal with the two actions separately. It is, in my view, clear that the trade marks action cannot properly be described as one which seeks to get in assets for the State of Spain. The correct analysis is that if it is successful, the assets recovered will accrue to a company indirectly owned and controlled by the State of Spain. This is another feature which distinguishes the trade marks action from all the other cases on indirect enforcement, in each of which the assets recovered would ultimately have accrued to the foreign state itself. Mr. Reid said that it all comes to the same thing, but I agree with Mr. Brodie that it does not. In spite of his protestations to the contrary, I think that Mr. Reid's submission necessarily involves the proposition that the property owned by a company belongs to its shareholders or is held or managed by the company on behalf of its shareholders. It is established by a long series of cases starting with Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22 that, except where the company is a mere facade, that proposition forms no part of English law. The point was conclusively disposed of in this class of case by Devlin J. in Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248, 269-278. One of the most significant points there made was in regard to what Devlin J. described as the formidable factor of creditors: see pp. 277-278. If Mr. Reid's submission is correct, it must follow that the trade marks action cannot be pursued and that the assets which it is sought to recover will be lost to Williams and Humbert, even though the legitimate claims of its creditors might thereby be frustrated. That cannot be correct. I altogether reject the submission in relation to the trade marks action.

It is possible that the position in this last respect may be different in the Multinvest action. The question, whether that action can properly be described as an action which seeks to get in assets for the State of Spain, is one of Spanish law. It is tempting to suppose that Spanish law would not differ from English law on this point, but the allegation that Rumasa and the two banks have in substance become organs of the state, although not further particularised, prevents me from acting on that supposition at this stage. However, that by itself is not enough to affect the result of the application in the Multinvest action.

For the reasons earlier expressed, and for the additional reason in the case of the trade marks action, I am of the opinion that neither action is capable of being a direct or indirect enforcement of the Decree Law or the New Law. Accordingly, even if the laws are penal or "other public laws" I am in no doubt that Mr. Reid's alternative submission, like the first, is bound to fail. I therefore propose to accede to Williams and Humbert's application to strike out the material paragraph in the defence in the trade marks action and to dismiss Mateos's application to amend his defence in the Multinvest action.

Finally, I must record that in relation to Mr. Reid's alternative submission Mr. Brodie advanced an argument based on the doctrine of foreign act of state. The view that that doctrine forms part of English law has now received approval at the highest level, where it has been expressed as one requiring judicial restraint or abstention in adjudicating upon the transactions of foreign sovereign states: see Buttes Gas and Oil Co. v. Hammer (No. 3) [1982] A.C. 888. Although the consequences of that decision may be far reaching, I believe that the doctrine is unlikely to be of great practical importance in cases which are already governed by established principles of private international law. Since I have decided these applications in favour of the plaintiffs without resort to the doctrine, it is unnecessary for me to explore that question further.

Orders accordingly. Leave to appeal. (T. C. C.

B. )

Solicitors: Herbert Smith & Co.;Denton Hall & Burgin.

INTERLOCUTORY APPEALS from Nourse J.

The defendants in the first action appealed by notice of appeal dated 10 January 1985 on the grounds, inter alia, that (1) the judge erred in holding that the defences relied on in paragraph 6(e) of the amended defence were bound to fail; (2) the judge erred in failing to hold that the proceedings constituted or arguably constituted an attempt to enforce indirectly foreign laws which fell into the category of foreign laws, namely, penal, revenue or other public laws, which the English courts would not enforce directly or indirectly; (3) the judge erred in law in failing to hold that the foreign laws were discriminatory and/or confiscatory and/or penal and accordingly fell within the category of foreign laws which the English courts would not enforce; (4) the judge erred in law in holding that the object of the foreign laws was to enable the State of Spain to obtain merely ownership and control of the shares in the plaintiff with the consequence that there was nothing left to enforce; (5) the judge erred in law in failing to hold that a further object of the foreign laws was to obtain control of the assets of the plaintiff; (6) the judge misdirected himself in holding that it was material that the plaintiff could or might have sued for the return of the trade marks as well before as after the making of the foreign laws; (7) the judge misdirected himself in holding that in order to hold that the proceedings did or might constitute an attempt to enforce a foreign law which fell within the category which the courts would not enforce, it would be necessary to pierce the corporate veil of the plaintiff and that the court was precluded from so doing; (8) the judge erred in law in failing to hold that in order to determine what was the substance of the matter he could or arguably could have regard to who or what in reality controlled the plaintiff and the objects of such person or body; (9) further or alternatively, the judge erred in law in failing to hold that the court could or arguably might be able to pierce the corporate veil of the plaintiff in order to determine whether the proceedings constituted an attempt indirectly to enforce the foreign laws; (10) the judge misdirected himself in holding that it was material that the position of creditors might have been affected by the disposition of the trade marks by the plaintiff to the first defendant when the question of fact whether the creditors of the plaintiff were affected was an unresolved issue in the proceedings; (11) the judge erred in law in failing to hold that the proceedings did or arguably might constitute an attempt to extend the operation of the foreign laws to property outside the State of Spain when the laws were made, namely the trade marks; and (12) the judge erred in law in failing to hold that the rights being asserted by the plaintiff in the proceedings were at the instigation of the State of Spain and would indirectly serve claims of that state of such a nature as were not enforceable in the English courts.

By a respondent's notice dated 1 February 1985 the plaintiff gave notice of intention to contend that the judge's decision should be affirmed on the additional grounds that (1) neither of the foreign laws fell into the category of foreign penal laws which English courts would not enforce; (2) there was no category of foreign public laws, other than penal or revenue laws, which the English courts would not enforce; (3) alternatively, if there were such a category, the foreign laws did not fall within it; (4) English courts would (a) refrain from any investigation as to the nature, character and effect of laws of a duly recognised friendly foreign sovereign state (including penal and revenue laws) on or in relation to property situated within the territorial jurisdiction of that state, but (b) recognise the juridical effects of such laws and the acts of the state thereunder or in relation to such property, and the foreign laws in question affected and related to property wholly within the territorial jurisdiction of the State of Spain and not to the subject matter of the action; (5) if, contrary to the finding of the judge, Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 516 was not distinguishable that

decision ought not to be followed; and (6) in any event the matters raised in paragraph 6(e) of the amended defence could not be raised by way of defence to the action but could only be raised by way of an application to strike out the action for want of authority.

In the second action the third defendant appealed by notice of appeal dated 10 January 1985 on the grounds that (1) the judge was wrong in holding that the defences raised by the proposed amendments to the defence were bound to fail and that leave to make them should consequently be refused; (2) the judge should have held that the proceedings constituted or might arguably constitute an attempt to enforce indirectly foreign laws which fell into the category of foreign laws which the English courts would not enforce directly or indirectly and would or might fail on that ground; (3) the judge should have held that the proceedings constituted or might arguably constitute an attempt to extend the operation of the Spanish laws to property situated outside Spain when the laws were enacted, namely, the shares in the defendant Multinvest N.V. and would or might fail on that ground; (4) the judge was wrong in holding that the rights being asserted by the plaintiffs in the proceedings were independent rights which arose before the foreign laws came into force and should have held that the plaintiffs were asserting not their rights as they originally existed but as altered by the foreign laws and not their own rights but the rights of the State of Spain; (5) the judge should have held that the rights being asserted by the plaintiffs in the proceedings were being enforced at the instigation of the State of Spain and would indirectly serve claims of that state of such a nature as were not enforceable in the English courts; and (6) the judge should have held that, on the correct assumption that the plaintiffs were organs of the State of Spain, the whole object of the proceedings was to collect assets for the benefit of the State of Spain and thereby indirectly enforce the foreign laws in relation to such assets.

By a respondent's notice dated 1 February 1985 the plaintiffs gave notice of their intention to contend that the judge's decision should be affirmed on additional grounds identical to those set out in the respondent's notice in the first action.

Mark Littman Q.C., Robert Reid Q.C. and Simon Berry for the defendants in the first action.

Mark Littman Q.C., Robert Reid Q.C. and W. R. Stewart-Smith for the third defendant in the second action.

C. A. Brodie Q. C., Alan Steinfeld and Daniel Gerrans for the plaintiffs in both actions.

Cur. adv. vult.

3 April. The following judgments were handed down

FOX L.J.

These are appeals from orders of Nourse J. in which he held, upon interlocutory applications in two related actions, that defences concerning the enforcement or recognition of foreign expropriatory laws could not succeed and should be disallowed at this stage. The account of the facts which I give below merely follows the judge's very clear exposition and I set it out for convenience of reference.

In the first action ("the trade marks action") the plaintiff is Williams and Humbert Ltd., a company incorporated in England. There are seven defendants. The first is a company incorporated in Jersey called W. & H. Trade Marks (Jersey) Ltd. The second defendant is Jose Maria Ruiz-Mateos ("Mateos"). The remaining five defendants are the four brothers and the sister of Mateos.

In the second action ("the Multinvest action") there are three plaintiffs, all of which are companies incorporated in Spain. They are Rumasa S.A., Banco de Jerez S.A. ("Jerez") and Banco del Norte S.A. ("Norte"). There are four defendants. The first is Multinvest (U.K.) Ltd. which is a company incorporated in England; the second is Carlos Quintas ("Quintas"); the third is Mateos and the fourth

is a Netherlands Antilles company called Multinvest N.V.

A firm bearing the name of Williams & Humbert traded, from about 1877, as sherry and port shippers. It marketed sherry under the well-known mark "Dry Sack" and was absolutely entitled to the trade marks in that name. Williams and Humbert Ltd. upon its incorporation in 1952 took over that firm. In 1972 Rumasa S.A. acquired the whole of the issued share capital of Williams & Humbert Group Ltd. ("Group") which is the holding company of Williams and Humbert Ltd. The shareholding in Rumasa S.A. was then owned as to 50 per cent. by Mateos and as to the remainder by his brothers and sister.

At the end of 1975 and in early 1976, which was shortly after the death of General Franco in November 1975, certain transactions were effected in relation to the "Dry Sack" trade marks. The central feature of these transactions was the execution on 25 February 1976 of an agreement under seal ("the master agreement") made between Williams and Humbert Ltd. and W. & H. Trade Marks (Jersey) Ltd., which latter company had been previously incorporated as part of the transactions and whose main object was the holding and exploitation of trade marks. The issued share capital in W. & H. Trade Marks (Jersey) Ltd. was registered in the name of a Jersey trust company. By the master agreement (as subsequently varied in October 1980) (1) Williams and Humbert Ltd. agreed to assign the "Dry Sack" trade marks to W. & H. Trade Marks (Jersey) Ltd. and (2) W. & H. Trade Marks (Jersey) Ltd. agreed to grant back to Williams and Humbert Ltd. licences to use the marks but upon condition that W. & H. Trade Marks (Jersey) Ltd. could terminate the licences without notice if, inter alia, any part of the share capital or assets of Rumasa S.A. or any of its subsidiaries for the time being should be sequestrated or compulsorily acquired. Another document was also executed. That was a trust deed of 27 February 1976 between the Jersey trust company, Mateos and one of his brothers whereby the trust company declared that it held the shares in W. & H. Trade Marks (Jersey) Ltd. upon trusts for the benefit of Mateos and his brothers and sister or their descendants, but so that, in the event of confiscation, the shares were to be held for the beneficiaries absolutely. All these arrangements had taken effect by the end of 1980.

In February 1983 there was enacted in Spain a Royal Decree Law 2/83 ("the Decree Law"). The expressed effect of this was that (1) all shares in the capital of some 230 companies in the Rumasa Group (including Rumasa S.A. itself, Jerez and Norte) should be expropriated, and (2) the State of Spain should take immediate possession of the expropriated companies and acquire complete control of their shares by operation of law and so that the taking of possession should involve assumption of all powers of company operation.

In June 1983 a further law was passed which was Decree Law 7/83 ("the New Law"). This amended the Decree Law but its effect was not materially different for present purposes. The Decree Law was unsuccessfully challenged in the Spanish Constitutional Court. Proceedings in that court to challenge the validity of the New Law are still pending. The matter proceeded before the judge and in this court on the basis that the New Law is valid. I will refer to the Decree Law and the New Law as "the decrees."

As a result of the expropriation: (i) the shares in W. & H. Trade Marks (Jersey) Ltd. (in which company the "Dry Sack" trade marks are vested) became held upon trust for the beneficiaries under the 1976 trust deed and (ii) the State of Spain controls Rumasa S.A., Norte and Jerez; and through Rumasa S.A. the State of Spain controls Williams and Humbert Ltd. As appears from an exhibit to the affidavit of David Laurence Gold sworn on 2 October 1984, Rumasa S.A. owns the shares in Group which in turn controls Williams and Humbert Ltd. and a company called Williams & Humbert (International) Ltd.

The effect of the 1976 arrangements in the events which happened was to remove the

"Dry Sack" trade marks from Williams and Humbert Ltd. and to vest the benefit of them in Mateos and his family. Prior to 1983 nobody was going to challenge the 1976 arrangements because Mateos and his family, through Rumasa S.A., controlled Williams and Humbert Ltd. That has now changed because the State of Spain controls Rumasa S.A. and, therefore, Williams and Humbert Ltd. The latter company has now started the trade marks action in which it claims, inter alia, (i) that the 1975 and 1976 arrangements were ultra vires Williams and Humbert Ltd. as involving a gratuitous disposition of its assets for the benefit of the Mateos family or, alternatively, an unauthorised reduction of capital, alternatively (ii) a declaration that the arrangements were entered into to the knowledge of W. & H. Trade Marks (Jersey) Ltd. in breach of duty by the directors of Williams and Humbert Ltd. and rescission of the arrangements.

By paragraph 6(e) of the amended defence in the trade marks action it is alleged, inter alia:

"the plaintiffs are not entitled to the relief sought or any relief by reason of the fact that these proceedings represent an attempt to enforce a foreign law which is penal or which otherwise ought not to be enforced by this court and further or alternatively that it would be contrary to public policy to grant the relief sought or any relief."

Various facts and matters relied upon are then set forth. The plaintiffs seek to have paragraph 6(e) of the amended defence struck out as disclosing no reasonable defence.

As regards the Multinvest action, the registered (and beneficial) owner of the issued share capital of Multinvest (U.K.) Ltd. has at all material times been Multinvest N.V. Before 23 February 1983 the entire issued share capital of Multinvest N.V. (which were bearer shares) were held to the order of Mateos. Rumasa S.A. claims that it has at all material times been the beneficial owner of the shares in Multinvest N.V.; alternatively, they were wholly or partially purchased with moneys belonging to Jerez or Norte and were therefore held by Quintas and Mateos or one of them as trustees for Jerez and Norte. During 1982 Jerez on the directions of Norte made loans of about 46 million U.S. dollars to various puppet companies mostly incorporated in Panama and the remainder in Argentina, Ecuador, Liechtenstein or England. None of these companies took any benefit from the loans. They all gave instructions for the loans to be credited or transferred to accounts controlled by Multinvest N.V. The State of Spain has now caused Rumasa S.A., Jerez and Norte to commence the Multinvest action which alleges that Mateos acted in breach of his fiduciary duties to the plaintiffs and that Quintas and Multinvest (U.K.) Ltd. became involved in such breaches. A receiver was appointed in 1983 and he is now in possession of the bearer shares in Multinvest N.V.

Multinvest N.V., Multinvest (U.K.) Ltd. and Quintas do not appear. Mateos does appear and has put in a defence which he seeks to amend by raising a similar defence to that to which I have referred in the trade marks action.

The judge stated the issue thus, ante p. 378C-E:

"Shortly stated, the defendants' contention is that the 7Decree Law and the New Law are expropriatory laws which either ought not to be recognised or ought not to be enforced in England; and that, since the State of Spain is indirectly the beneficial owner of the shares in Williams and Humbert Ltd. and directly the beneficial owner of the shares in Rumasa S.A., Jerez and Norte, these actions are indirect attempts to enforce those laws over here and cannot succeed. The plaintiffs' objective in seeking to have that defence disallowed at this stage is to save time and expense, in particular to avoid the investigation of various questions of Spanish law at trial. They are also unwilling that this court should become the forum for the discussion of any question of Spanish domestic policy."

The judge's conclusion on the matter was that the defences in question were bound to fail. He therefore struck out the material part of the amended defence in the trade marks action and refused to grant leave to amend in the

Multinvest action.

In approaching the matter the judge distinguished between (i) foreign laws which are not recognised in England at all and which, by a legal fiction, are deemed not to exist (for example, laws constituting grave infringements of human rights) and (ii) foreign laws (not being of the class which I have just mentioned) which confiscate property situate within the foreign state; these are recognised in England but will not be directly or indirectly enforced here if penal. This classification is accepted by the parties for the purposes of these applications. It is not suggested that this case comes within the class of laws which would not be recognised in England and are by fiction treated as not existing.

I proceed to deal with the two cases separately.

The trade marks action

Rumasa S.A. is a company incorporated in Spain. It is not in dispute that the decrees were effective to vest the ownership of the Rumasa S.A. shareholding in nominees of the State of Spain. Nor is it disputed that the transfer of ownership would be recognised by English law. Those concessions are, I think, rightly made and are, in my view, the necessary consequence of two things which need to be spelt out. First, the Rumasa S.A. shares were locally situate in Spain when the decrees were enacted. Secondly, they were effectively reduced into the control and possession of the nominees of the State of Spain before these proceedings started. English law recognises the authority of a foreign state to legislate about property within its borders. And, if that property has been brought under the control, within the foreign jurisdiction, of the person to whom title is given by the foreign legislation, the English courts will not interfere with his title or possession: see Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532 and Princess Paley Olga v. Weisz [1929] 1 K.B. 718.

In the Princess Paley Olga case, a group of revolutionaries, whose act was subsequently adopted by the Soviet Republic, seized the Paley Palace and its contents against the will of the Princess. The palace was turned into a museum. In 1928 part of the contents were sold by the Soviet Government to the defendant Weisz. On discovering that these chattels were in London, the Princess sued Weisz for their return to her. The action failed. Sankey L.J. put the matter thus, at pp. 729-730:

"At the time of the seizure in question the Soviet Government had been in power since 7 November 1917... as de facto, and on 1 February 1924 as de jure the Government of Russia. In addition to these facts it must be added that the Soviet Government kept control of these goods down to the time of their sale, purported to sell them, and describes them in the agreement of April 1928 as 'the nationalised property of the Paley Palace.' In these circumstances in my view, the Princess was dispossessed of this property by an act of state behind which our courts will not go."
Scrutton L.J. said, at p. 725:

"Our Government has recognised the present Russian Government as the de jure Government of Russia, and our courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts."

Lord Denning M.R. in Attorney-General of New Zealand v. Ortiz [1984] A.C. 1, 23 observed that if, after the confiscation, the Princess had removed the articles from the museum and brought them to England, the English courts would have made her give them up to the Soviet Government.

In Luther v. Sagor [1921] 3 K.B. 532 in June 1918 the Soviet Republic passed a decree declaring that all mechanical sawmills of a certain value and all wood working establishments belonging to private companies were to be the property of the Republic. In 1919 agents of the Republic seized the plaintiff's sawmill in Russia and the

stock of wood therein. In 1920 agents of the Republic sold some of the stock to the defendants who imported it into England. The Court of Appeal held that, since the Soviet Government had been recognised by the United Kingdom prior to the decree of June 1918, the validity of the decree and the sale of the wood could not be impugned in the English courts. Scrutton L.J. said, at p. 557:

"I am of opinion that the defendants show a title derived from a recognised sovereign state, which by the comity of nations cannot be questioned in these courts..."
(He went on to consider and reject an argument that the Soviet legislation and titles derived under it should be refused recognition as unjust).

In Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476 the United States Government, while a ship was on the high seas bound for England, served a notice of levy in respect of unpaid tax upon the shipowners, demanding that they surrender all property in their possession belonging to two United States taxpayers; such property included goods on the ship. When the ship reached Southampton the United States Government claimed possession of the goods. Under United States law the government was entitled to levy upon the goods of a defaulting taxpayer. The ship was registered in the United States. The Court of Appeal held that the claim was an attempt to enforce, indirectly, the revenue laws of the United States and dismissed it. But the court recognised that if the notice of levy had been sufficient to reduce the goods into the possession of the United States Government it would have been enforced in England "because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law": see per Lord Denning M.R. at p. 482.

In the present case we are dealing with decrees which were in no way in excess of territorial jurisdiction and which would be recognised in England. And I think that the recognition in England in no way depends on whether the person seeking the recognition is the Spanish State or its nominee or organ or a person claiming through any of those.

It is, however, a principle of English law that our courts:

"have no jurisdiction to entertain an action: - (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or (2) founded upon an act of state:" see Dicey & Morris, The Conflict of Laws, 10th ed. (1980), vol. 1, pp. 89-90.
What is said by the defendants is that the trade marks action is an attempt by the Spanish State to enforce the decrees indirectly in respect of property in England, i.e., the trade marks. My first comment as to that is that the purpose of the decrees was to expropriate the shares. That has been fully achieved and, moreover, is, for the reasons which I have given, recognised by English law. Secondly, the cause of action pleaded by Williams and Humbert Ltd. did not itself derive from the decrees. If it is a good cause of action (the only hypothesis we have to consider) it came into existence before the decrees and has remained in the company ever since. The court has before it an English company, suing in its own name in respect of a cause of action arising under English law for relief in respect of property in England which, it alleges, was improperly taken from it. The statement of claim neither pleads nor needs to plead the decrees; the reference to "a Spanish Royal Decree" in paragraph 6 of the statement of claim is narrative, not material allegation.

The defendants, however, say that one has to look at the substance of the matter and not merely at the formal title. The substance, it is contended, is that the Spanish State is seeking through Williams and Humbert Ltd. (which it controls through its shareholding in Rumasa S.A. and Rumasa S.A.'s shareholding in Group) to obtain control of property which at all material times has been locally situate in England. And the source of this claim is the expropriation by the Spanish State of the Rumasa S.A. shareholding. So the claim, it is said, is merely the attempt of the Spanish State to enforce the decrees indirectly in England. Before dealing with that argument

there are two authorities to which we were referred on this aspect on which I should comment. The first is Peter Buchanan Ltd. v. McVey [1955] A.C. 516 which is reported as a note to Government of India v. Taylor [1955] A.C. 491. The defendants place much reliance upon it. It is a decision of Kingsmill Moore J. in the High Court of Eire (and upheld by the Supreme Court). Peter Buchanan Ltd. was a company registered in Scotland. The defendant was the sole beneficial owner of the shareholding and was, in effect, the sole director. He was assessed to very large sums in the United Kingdom in respect of tax claims which he thought unjustified and had no intention of satisfying. So he stripped Peter Buchanan Ltd. of its very large assets and removed them to Ireland. The revenue got wind of that and made assessments for excess profits tax on the company. Those assessments not being satisfied, the revenue obtained a compulsory winding up order. They secured the appointment of a liquidator and it was common ground that he worked hand in glove with the revenue to try and recover the tax. The liquidator then took out a summons in Eire for an account of all sums due to the company by the defendant as director trustee or agent and payment of all sums found due. The judge held that recovery did not depend merely upon the form on which the claim was made but that the substance must be scrutinised and that so scrutinised the sole purpose of the proceedings in Ireland was to collect Scottish revenue debts. Since the Irish courts, like most others, will not collect the revenue debts of another country, the claim failed.

The basis of the decision seems to have been that the revenue was really the sole creditor so that any sums recovered would, after payment of the liquidator's costs, go straight to the revenue. The decision seems to me to be far removed from this case. The purpose of the relevant foreign law in the Peter Buchanan case was the collection of revenue. And so it was also in Government of India v. Taylor [1955] A.C. 491 and Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476. It had not been achieved and could not be achieved in any of those cases without the aid of the law of the forum. In the present case the purpose of the relevant foreign law was to acquire the shares in the Rumasa companies. That has been achieved and the assistance of the law of the forum is not necessary.

The other case to which I should refer is Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140. King Alfonso of Spain had, with his own money, purchased (a) victory bonds and (b) shares in a company called Trinidad Central Oilfields Ltd. He deposited them with the Westminster Bank in London to the order of its Madrid branch. In 1923, the Madrid branch having been closed, he directed that the securities should be held by the Westminster Bank in London to the order of Banco de Vizcaya as his agent. The Spanish Government subsequently declared the King to be a traitor and that all his property be seized for the benefit of the state. Bankers in Spain having a deposit of any such property were ordered to deliver it to the Spanish Treasury. Banco de Vizcaya accordingly claimed the securities from the Westminster Bank, who interpleaded and joined the King. Lawrence J. dismissed Banco de Vizcaya's claim. He held that Banco de Vizcaya was not asserting its original contractual rights but those rights as altered by the Spanish decrees; and he said, at pp. 143-144:

"the substance of the right sought to be enforced by the plaintiffs is the delivery to them of the securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities to the Spanish Government in defiance of the mandate of [the King], and, that being so, it seems to be unarguable that the enforcement of the plaintiffs' right will not directly or indirectly involve the execution of the decrees."

The core of the decision is on p. 144 where the judge cites a passage from the judgment of Lord Loughborough in Folliott v. Ogden (1789) 1 H.Bl. 124, 135 which begins:

"The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority;..."

Lawrence J. followed this and he dismissed Banco de Vizcaya's claim. The decision was plainly right. Banco de Vizcaya's case depended directly upon the Spanish decrees. It had no other title; as Lawrence J. observed, it was acting in defiance of the King's mandate. But the Spanish decrees could not avail Banco de Vizcaya because what it was claiming was documents of title which were situate in England when the decrees were passed and the bank was simply claiming in reliance on the decrees. But the decrees were of no effect in relation to the documents. The position here is wholly different. The decrees were fully effective over the only property which they purported to effect, i.e. the shares.

I return to the central issue - the argument that the trade marks action is, in substance, an indirect enforcement of the decrees. In my opinion, that contention is without foundation in English law. My reasons are as follows. (1) The purpose of the decrees, so far as relevant, was to obtain control of Rumasa S.A. With that would go control of Williams and Humbert Ltd. All that has been fully achieved. The decrees are recognised as valid by English law and have been carried into effect. The shareholding in Rumasa S.A. has been transferred. To talk of "enforcement" of the decrees (directly or indirectly) is beside the point. So far as the decrees are concerned there is nothing left to enforce. In that respect this case is quite different from the Peter Buchanan case [1955] A.C. 516 where the United Kingdom revenue law still needed to be enforced. It is said, however, that there is attempted enforcement of the decrees in that Williams and Humbert Ltd. is seeking to recover its trade marks. That is not an enforcement of the decrees directly or indirectly. It is an enforcement of the ordinary rights of Williams and Humbert Ltd. under the law of England. The decrees form no part of the cause of action.

(2) The weakness of the defendants' position is, I think, demonstrated by the fact that they have to plead this defence at all. What the defendants are complaining of, in reality, is that, because of the decrees, they have lost control of Williams and Humbert Ltd. The defence asserts in paragraph 6(e)(i)(B), inter alia, that, but for the decrees, this action would never have been brought. No doubt that is right. But either the persons at present controlling Williams and Humbert Ltd. are lawfully in control or they are not. If they are not, then the defendants' proper course is to apply to strike out the action on the ground that it is brought without authority. They do not seek to do that and, since the decrees are recognised here and have been carried into effect, I do not see how they could do so. If, on the other hand, the persons are lawfully in control of the company, then the decrees, in my view, are irrelevant to a cause of action which existed before the decrees were ever enacted and which, as a cause of action, is not affected by them.

(3) The decrees were effective to transfer the shareholding in Rumasa S.A. to the nominees of the state. What was transferred must have been the shareholdings together with all the rights ordinarily attached thereto. I see no basis upon which English law, having recognised the decrees, which have been fully implemented, can then cut down their effect. The right to control Williams and Humbert Ltd. is as much a right attached to the expropriated property as was the right of the Soviet Government to give a good title to third parties in Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532 and Princess Paley Olga v. Weisz [1929] 1 K.B. 718. It is not the consequence of extra-territorial legislation at all. Rumasa S.A. has at all material times owned Group; and similarly Group has owned Williams and Humbert Ltd. Accordingly, it is, in my view, irrelevant that, as the defendants assert, Rumasa S.A. has not reduced the trade marks into possession. The trade marks were not the subject of the decrees. The subject of the decrees were the shares and the rights incident thereto.

(4) The action is not in form a claim by the Spanish State and there is no justification in

English law for disregarding the separate corporate personality of Williams and Humbert Ltd. or for treating it as if it were the Spanish State (if that were relevant). In E.B.M. Co. Ltd. v. Dominion Bank [1937] 3 All E.R. 555 Lord Russell of Killowen, giving the advice of the Privy Council, said, at pp. 564-565, that it was:

"of supreme importance that the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand."

And Professor Gower comments in Modern Company Law, 4th ed. (1979), p. 100:

"Since the Salomon case [1897] A.C. 22, the complete separation of the company and its members has never been doubted. As we shall see later, there are cases in which the legislature, and to a very small extent the courts, have allowed the veil of incorporation to be lifted, but in general it is opaque and impassable."

In Woolfson v. Strathclyde Regional Council (1979) 38 P. & C.R. 521, 526, Lord Keith of Kinkel, in whose speech the other members of the House concurred, refers to "the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts." An example of that is Jones v. Lipman [1962] 1 W.L.R. 832 where the defendant tried to avoid completing a contract for the sale of his house by conveying it to a company formed for the purpose.

The result, in my view, is that what Williams and Humbert Ltd. recover must be regarded as recovered for the benefit of the company. The fact that the company is indirectly controlled by the State of Spain does not alter that circumstance. If persons choose to take advantage of the benefits of incorporation with limited liability, they must accept its disadvantages.

Further, I entirely agree with the judge that a result which puts assets of the company beyond the reach of its creditors is plainly unacceptable. It is suggested that, whilst dismissing the action, the court could set up a receivership of the trade marks for the benefit of creditors. I do not think that is an answer; if Williams and Humbert Ltd. has, as a company, a good cause of action, I do not see how that can be taken away from it, merely because the beneficial ownership in its shares has lawfully changed (by whatever means) since the cause of action arose. It is entitled to recover its own and the creditors will look to the company for payment.

The Multinvest action

The same considerations apply to the Multinvest action save that the claim is not made by a subsidiary company but by Spanish companies whose shares were the subject of the decrees. I see no basis in English law for refusing such companies relief to which they would otherwise be entitled in respect of their assets because decrees which are recognised as valid in England have changed the control of their shareholdings. The companies would have been entitled to sue before the decrees were enacted and the decrees, in my view, cannot destroy that right.

It is necessary to bear in mind throughout that we are dealing with decrees which operated, quite lawfully, on property in Spain and within the jurisdiction of the Spanish State, i.e., shares in the companies. The decrees neither created nor in any way altered the cause of action which is asserted by the plaintiffs in either the Multinvest action or the trade marks action. It seems to me that, if the Soviets were able, in Luther v. Sagor [1921] 3 K.B. 532 and Princess Paley Olga v. Weisz [1929] 1 K.B. 718, to create titles which would be protected in England, it is quite illogical to deny to the plaintiffs the right to sue in England in the present cases in reliance on causes of action which as such owe nothing to the decrees at all.

I should add that, like the judge, I am prepared to proceed, for present purposes, on

the basis that the decrees were penal or public or acts of state. The Russian decrees in Luther v. Sagor and Princess Paley Olga's case were no different in substance to the decrees in the present case.

We were referred by the defendants to certain American decisions and some articles by Dr. Mann, in particular an article, published in 1962, entitled "The Confiscation of Corporations Corporate Rights and Corporate Assets and the Conflict of Laws." I do not question at all the persuasive value of decisions in the United States or of writers of the distinction of Dr. Mann, but we can only decide this case on established principles of English law and, for the reasons which I have given, I take the view that the defence pleaded in paragraph 6(e) of the amended defence in the trade marks action is bound to fail both in that case and in the Multinvest action. I see no considerations of general public policy to lead me to any different conclusion. I add only two comments.

First, the American authority upon which the defendants principally relied was Zwack v. Kraus Bros. & Co. Inc. (1956) 237 F. 2d. 255. In that case the appellate court accepted the judge's finding that the plaintiffs were "the equitable owners" of the property in question notwithstanding that it seems to have been owned by a corporate body: see p. 261. As I have indicated, I do not think that English law regards shareholders as the owners of the corporate property.

Secondly, Dr. Mann (at p. 492 of the article which I have mentioned) observes that it is reassuring to think, in relation to Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629, that, if Mr. Frankfurther had turned himself into a limited company, the Nazi "Commissar" would still not have succeeded. I agree; but in this case we are not dealing with laws of the kind with which Frankfurther v. W. L. Exner Ltd. was concerned. I think it is now clear that English law would not recognise such legislation at all: see Oppenheimer v. Cattermole [1976] A.C. 249.

As regards jurisdiction, I accept that R.S.C. Ord. 18, r. 19 is intended only for plain cases and this case has involved substantial argument, in both courts, over many days. But

"The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result."
See per Sir Gordon Willmer in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, 700. It may, of course, be difficult for a judge to decide whether, if a case obviously does involve substantial argument on the issue of striking out a pleading, it is wise to embark on the hearing at all. A great deal of time and money may be expended on the issue and, in the end, the judge may have to say it is an arguable case and nothing has been achieved. In the present case Nourse J., as I understand it, accepted the contention of the plaintiffs that, if the matter was decided in their favour, time and expense in the investigation at the trial of matters of fact and of Spanish law would be avoided. I see no reason to disagree with him on that.

On the whole matter I have, like the judge, reached the clear conclusion that the parts of the pleading in issue demonstrate no reasonable defence. I would dismiss the appeals.

LLOYD L.J.

These are expedited appeals from a decision of Nourse J. on interlocutory applications in two related actions. In the first action he ordered part of a defence to be struck out underR.S.C., Ord. 18, r.19(1). In the other he refused leave to amend the defence. The point raised or sought to be raised is the same in both cases, namely, whether the plaintiffs' claim would, if successful, involve the indirect enforcement by our courts of a foreign expropriatory decree. After a hearing lasting seven days the judge held, in effect, that the point was unarguable. The question for us, after further lengthy hearing, is whether he was right.

It was common ground that the test to be applied in both actions is the same. Does the existing defence in the one action, or the proposed defence in the other, disclose a reasonable defence within the meaning of R.S.C., Ord. 18, r. 19(1)(a)? The meaning of "reasonable cause of action" and "reasonable defence " has been considered in numerous cases set out in the notes to Ord. 18, r. 19 in The Supreme Court Practice (1985). In one of the most recent of these cases, McKay v. Essex Area Health Authority [1982] Q.B. 1166, the Court of Appeal were divided. Ackner L.J. was of the view that it was a proper case to strike out. Griffiths L.J. was of the contrary view. Stephenson L.J., after anxious consideration, came down with Ackner L.J. in favour of striking out. I shall have to return to McKay v. Essex Area Health Authority a little later, after considering the facts and arguments in the present case.

The facts which we are required to assume are set out with conspicuous clarity in the judgment of Nourse J. I need not repeat them here. It is sufficient to say that, in the so-called trade marks action, the claim is brought by Williams and Humbert Ltd., an English company, for a declaration, inter alia, that agreements entered into in 1975 and 1976 between Williams and Humbert Ltd. and a company registered in Jersey, W. & H. Trade Marks (Jersey) Ltd., are void and unenforceable. The shares in the Jersey company are held by Mr. Jose Maria Ruiz Mateos and members of his family. The effect of success in that action would be that trade marks, which are currently vested in the Jersey company and which had previously been vested in the English company, would revert to the English company.

In the so-called Multinvest action, the plaintiffs are three Spanish companies, Rumasa S.A. and two banks in the Rumasa Group. During 1982 one of the two banks lent sums totalling $46,000,000 to various companies in Panama and elsewhere outside Spain. These companies all gave instructions for the loans to be transferred to accounts under the control of a company called Multinvest N.V. The plaintiffs say that the shares in Multinvest N.V. were bought by or on behalf of Mr. Mateos in breach of a fiduciary duty owed by Mr. Mateos to the plaintiffs. They claim a declaration, inter alia, that the shares in Multinvest N.V. are held on trust for the plaintiffs. The effect of success in the Multinvest action would be that the plaintiffs would gain control of Multinvest N.V. and thereby be enabled to recoup their loans.

Prior to 1983 the shares in Williams and Humbert Ltd., the plaintiffs in the trade marks action, were owned by another English company, Williams & Humbert Group Ltd. The shares in Williams & Humbert Group Ltd. were owned by Rumasa S.A., the first plaintiffs in the Multinvest action. The shares in Rumasa S.A. were owned by members of the Mateos family.

By Royal Decrees dated 23 February and 29 June 1983 the State of Spain purported to expropriate the entire share capital in Rumasa S.A., together with some 230 companies in the Rumasa Group, including the two banks named as second and third plaintiffs in the Multinvest action.

By paragraph 6(e) of their defence in the trade marks action, and by paragraph 15 of the proposed defence in the Multinvest action, the defendants say that the current proceedings represent an attempt to enforce a foreign law which is penal or which otherwise ought not to be enforced. The draft particulars of that plea extend to some 26 pages. It is that plea which the plaintiffs now seek to strike out.

For the purpose of the application to strike out we must, of course, assume that the facts alleged in the draft particulars will be established at the trial. These include the allegations (i) that control of all the expropriated companies, including Rumasa S.A., has been purportedly vested in the Direccion General del Patrimonio del Estado which is itself empowered to delegate to the Deposits Guarantee Fund; (ii) that Direccion General del Patrimonio del Estado and the Deposit Guarantee Fund are both organs of

the State of Spain; and (iii) but for the expropriation decrees, the plaintiffs would not be bringing either of the two present actions. The judge has inferred from the above assumed facts that both actions have been brought at the instigation of the State of Spain.

In those circumstances, the argument advanced by Mr. Littman, on behalf of the defendants, is simple. He submits, first, that the decrees are, at least arguably, penal. The judge was prepared to assume as much in the defendants' favour. By a respondents' notice, Mr. Brodie sought to persuade us that the decrees are not penal. But we did not find it necessary to hear Mr. Littman in reply on that point. For the second step in his argument Mr. Littman cites rule 3 in Dicey & Morris, The Conflict of Laws, 10th ed. (1980), pp. 89-90. That rule provides:

"English courts have no jurisdiction to entertain an action: - (1) for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign state; or (2) founded upon an act of state."

I need not refer to the authorities on which that rule is based. The leading case is probably Huntington v. Attrill [1893] A.C. 150 in which Lord Watson said, at p. 156:

"Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the courts of any other country."

Mr. Littman submits that both actions involve, at least arguably, the indirect enforcement of the Spanish decrees. I will return in a moment to the authorities on which he relies.

Mr. Brodie's argument to the contrary is equally simple. If the Spanish decrees had purported to expropriate the assets of the Spanish companies outside Spain, then, as I understand it, he conceded that, on ordinary principles, they would have been ineffective to transfer title to such assets. But the Spanish decrees do not purport to touch the assets of the Spanish companies. They expropriate the shares, not the assets. The effect of the decrees was exhausted once the shares in Spain had been transferred to their new owners. Thereafter, there was nothing left to enforce, directly or indirectly. The present actions are straightforward actions in which the plaintiffs are seeking to recover their own assets on their own behalf; and not on behalf of the State of Spain or anyone else. The matter is put very well by the judge, ante, p. 385C-G:

"In order to judge whether either of these actions is capable of being an indirect enforcement of the two laws it is necessary to start by observing that their object, so far as material, was to acquire direct ownership and control of Rumasa S.A. and the two banks and indirect ownership and control of Williams and Humbert Ltd. That object has been duly achieved by perfection of the state's title in Spain. Accordingly, on a simple but compelling view of the matter there is nothing left to enforce. This consideration distinguishes the present case from all the others on indirect enforcement of penal or revenue laws. Thus, in Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140 the object of the Spanish law, so far as material, was to acquire possession of the ex-King's securities. That object had not been achieved in Spain and could only be achieved by invoking the assistance of the English court. Equally, in each of the four revenue cases the object of the foreign law was to exact payment of a tax or to seize goods in satisfaction thereof. That object had not been achieved in the foreign state and could only be achieved by invoking the assistance of the Irish or English court. This simple view of the matter, although enough to dispose of the point in favour of the plaintiffs in both actions, is confirmed by the fact that the rights, if any, which are asserted by the plaintiffs in each action are independent rights to recover their own assets which arose before the coming into effect of the two laws and were not affected thereby. It may not be a pure pleading point to observe that in neither action is it necessary for the plaintiffs to plead the existence, far less the effect, of the laws."

By way of reply, Mr. Littman concedes that the Spanish decrees were effective to transfer ownership of the shares. He concedes that both actions are in form actions to recover the plaintiff companies' assets. But that is, he says, only the start of the problem; not the finish. The question is whether, in the special case of foreign expropriatory legislation, the court should look behind the form in which the action is brought. If, as we must assume, the actions are being brought at the instigation of the Spanish State and if, as we may suppose, the object of bringing the actions is to defeat the measures plainly taken by Mr. Mateos to forestall the threat of expropriation, then he submits that the court, whatever the form of the actions, is in reality being asked to give indirect enforcement to the Spanish decrees, by putting flesh on the legislative bones.

In support of his argument Mr. Littman relies on three main sources of authority. First and foremost he relies on the writings of Dr. F. A. Mann, a learned author whose views are happily not yet authoritative but are, nevertheless, entitled to great respect. In an article entitled "The Confiscation of Corporations, Corporate Rights and Corporate Assets and the Conflict of Laws" published in 1962, 11 I.C.L.Q. 471 Dr. Mann considers six different ways in which a foreign state can expropriate property. The one with which we are concerned is the fourth, namely, where the foreign state does not

"interfere with the corporation, its legal structure or its property, but vests in itself all the shares in the company and, by virtue of its shareholding, exercises corporate rights by calling general meetings, appointing a new board and so forth;..."

By way of introduction to the fourth case, Dr. Mann says, at p. 490:

"It would, indeed, not be appropriate to make a distinction between three practically identical cases: that which is being confiscated is always the property of the totality of the members, irrespective of whether the confiscating state aims at control over the whole of the property of the corporation, whether it destroys the corporation and transfers its property to itself, or whether, without formally interfering with the corporation or its property, it transfers all shares to itself and thus makes the corporation one of its organs."

Dr. Mann then continues, at pp. 491-493:

"In view of the novelty of the problems, the requirements of legal certainty, the need for protecting trade interests and also the interests of justice, it is, however, necessary to proceed judiciously and diffidently before accepting any solution as adequate. One must never lose sight of the wholly unusual fact that the legal identity of the corporation has not been changed by the encroachment upon its members' rights, and that consequently there has been no change in the legal title to its property or in the legal responsibility for its debts. Therefore the interests of the corporation's creditors as well as the corporation's debtors demand very special care before the result is reached that the corporation is deprived of assets belonging to it. Where the state transfers to itself the property of the corporation, it may be that creditors lose their rights and are in effect expropriated, as happened in the case of the nationalisation of Russian insurance companies, or that creditors acquire rights against the state or one of its organs, as happened in the case of the Russian banking companies, or that some other provision is made for them. In the event of the confiscation of all shares no occasion for any such measure arises. The corporation exists and is liable to its creditors. These must not, outside the confiscating State, suffer something in the nature of confiscation by allowing shareholders to take the corporation's property.

"This situation would be disregarded by an argument which relies upon the lex situs alone and deduces from it the principle that the nationalised corporation cannot claim its property. In a legal sense the ownership of the corporation's property has not been affected. Consequently as a legal principle the rule of the lex situs is not in point.

"After the confiscation of all shares the

foreign corporation cannot, it is submitted, claim its English property in so far as in substance such a claim constitutes the exercise of sovereignty, the pursuance of prerogative rights, a step in the completion of confiscatory measures. Just as a foreign state cannot, as a matter of public international law, in England recover fines or taxes, so it cannot take confiscatory measures even if it employs proceedings in the High Court for the purpose.

"One would not attach undue weight to the dogmatic justification if it were not liable to have far-reaching practical results.

"If it were true that the nationalised foreign corporation has no right to its English property this would presumably mean that an English debtor would not be discharged by paying his debt to it. In the normal case this would be an unacceptable consequence, for where the debtor is unaware of the change of creditors, he must be at liberty to pay to his original creditor. Where, however, the dispossessed shareholder objects to the payment and interpleader proceedings follow, it is submitted that, as between the parties to the interpleader issue, the foreign corporation would be asserting a prerogative right and would therefore fail. It is reassuring to think that if Mr. Frankfurther had turned himself into a limited company a 'Commissar' appointed by the Nazis in respect of its business would have had as little success as the 'Commissar' who was appointed in respect of Mr. Frankfurther's firm and whose claim to moneys due from W. L. Exner Ltd. was rejected by Romer J.

"Whether the foreign corporation's claim involves the assertion of a prerogative right depends upon the identity of the person for whose benefit the assertion is made. Let it be assumed that the corporation nationalised in Hungary has no assets in Hungary but it has Czechoslovakian and Austrian trade creditors for whose satisfaction it needs the English assets. It is, it is submitted, entitled to them because the claim is not a confiscatory measure. Any other result would be unacceptable, particularly since the trade creditor must not be put into a position in which he has to seek legal protection elsewhere than in the courts originally envisaged by him. Where only part of the English property is required for the satisfaction of trade creditors, the foreign corporation must be entitled to this part of its English assets.

"Or consider a case in which a foreign state resells the shares confiscated by it and the corporation under its new management claims its English assets; this may often happen in cases in which the foreign state originally took the shares by way of a penalty or by way of execution in satisfaction of tax claims. If in such a case the corporation claims its English property it should probably be entitled to do so, because it is no longer possible to speak of the assertion of prerogative rights.

"There is, finally, a very doubtful question whether the nationalised foreign corporation which has succeeded in obtaining control over its English property, is under a duty to surrender it to the dispossessed member. Whatever the position of the corporation vis-a-vis third parties may be, as between itself and the dispossessed member it has no right to its English property in so far as this is not required for creditors. Accordingly the dispossessed member should be entitled to claim the English property as money had and received by the foreign corporation.

"The conclusion is that, as the result of the confiscation of all shares, the foreign corporation is in certain, though not necessarily in all, circumstances disentitled to its English property. Such property cannot be claimed by it if the recovery would enure exclusively to the benefit of the foreign state and would be in opposition to the rights of the dispossessed owner."

Dr. Mann then goes on to consider the most appropriate machinery whereby the foreign corporation can be allowed to recover its English assets for the purpose of satisfying its ordinary trade creditors, but not so as to enrich the foreign state. I return to that matter later.

Mr. Brodie submits that, in advancing the

views set out above, Dr. Mann, for all his learning and for all his caution, has allowed his heart to rule his head.

In a further article, "Conflict of Laws and Public Law," (1971) 132 Recueil des cours 108 published as the "Hague Lecture on International Law," Dr. Mann returns to the same point, at pp. 176-180. I mention it with diffidence, since it was not the subject of argument before us:

"In the course of the preceding observations there were references to the fact that 'enforcement' as disallowed by the law of nations involves three things, viz., firstly, 'a suit brought by the government or people of a state for the vindication of public law' as opposed to claims made by private persons in their own interest; secondly, both the direct and the indirect enforcement of public law; and, thirdly, not merely the form in which the claim is made, but 'in every sense the substance of the claim.' What matters is whether it is really a suit brought for the vindication of public law 'at the instance of the foreign state,' whether it 'has for its object the enforcement' of a foreign state's public law or whether it is 'in the nature of a suit in favour of the state.'

"The existence of these conditions is always a question of fact depending on evidence. While, therefore, it would be dangerous to generalise, it may be helpful shortly to survey some of the principal points which have arisen.

"1. In order to come within the rule, the claim the subject matter of enforcement must in substance be one arising jure imperii. The condition is fulfilled even if, in point of form, the state endeavours to enforce a judgment it has obtained against the defendant for the amount of the fine or tax or other liability or if the defendant has entered into an agreement to pay the amount due. If the foreign state has confiscated the owner's property situate in the state of the forum and attempts to recover it the claim must fail, for it is well established that the confiscation does not have extraterritorial effect: the state's acquisition being derived from an act of sovereignty and made solely for its own benefit, the claim itself, though originally founded exclusively upon a private person's private right involves the additional assertion of a foreign state's prerogative right. Even if the foreign state proceeds by virtue of an assignment executed by the owner the defendant would be unsafe in admitting the claim, for the contractual assignment may be a mere formality or sham to conceal the statutory transfer, in which event it is likely to be held invalid.

"2. The rule comes into operation if the foreign public law is being enforced by or for the benefit of the foreign state.

"Accordingly, the rule applies if the plaintiff is the foreign state, its instrumentality, agent, nominee or assignee; thus, it is submitted, where X has guaranteed and in fact paid the principal debtor's fine due to the foreign state, he cannot obtain reimbursement from the principal debtor in the forum, for as a result of the subrogation, he enforces the foreign state's right.

"Here again the law looks to substance rather than form and in certain circumstances it will, therefore, bar a plaintiff from recovering his own property in the forum. Suppose, to take a case put by Cross J., a Russian Princess has lent jewelry to a friend in England. Suppose, further, the Soviet Union purports to forfeit or confiscate the jewelry. It is certain that an action by the Soviet Union, based on the statutory assignment, would fail. It is likely that an action by the Soviet Union, based on a contractual assignment, would also fail in the absence of evidence of its validity and effectiveness. If, finally, the action is brought by the Princess herself, but she is proved to act 'at the instance' and for the benefit of the confiscator in pursuance of his policy to reach property in the forum, the action should also fail. In practice the jewelry would be available only for the Princess herself acting freely and voluntarily - an entirely satisfactory result. Moreover, if at the date of the confiscation the jewels had been in Russia, but had

subsequently been smuggled to England before the Soviet Government could obtain possession, it could not recover them, for the purpose of such an action would be to execute and give effect to the confiscation in England. This, it is suggested, would be contrary the rule. The result would be different if the confiscation had been completed in Russia by reducing the jewels into the possession of the Soviet Union and if thereafter they were stolen (albeit by the Princess herself) and brought to England: the Soviet Government rather than the Princess could recover them

"An action brought to enforce a prerogative right would similarly fail, if it is brought by a body corporate controlled or directed by the foreign state. Thus a foreign statutory body having corporate personality, such as Spain's Servicio Nacional del Trigo, cannot in England enforce the Spanish State's public rights. Such may be the result even in cases in which the plaintiff is a limited company or other corporation which is controlled by the foreign state and is used to give extraterritorial effect to such state's sovereign commands. This was so held in the remarkable case of Peter Buchanan Ltd. v. McVey, where a Scottish company's attempt to recover large sums due to it from the defendant failed in the courts of Eire on the ground that the action was brought for the purpose of satisfying a tax liability of the company. A few comparable cases have been decided abroad in the same sense. In particular, there is the example of a company which the foreign state has confiscated by vesting all or almost all the shares in itself or, in certain cases, merely by appointing its nominees as members of the board or as 'commissars.' Confiscation cannot be allowed any extraterritorial effect. Property situate in the forum which belonged to the corporation before the confiscation cannot, therefore, be recovered by it if and to the extent that, as a matter of legal or factual necessity, recovery would directly or indirectly make the property available to the foreign state. It would be nihil ad rem to suggest that the corporation is merely claiming its own property which, as such, has not been confiscated. The corporation would, on the footing of the assumption made, in substance be claiming property which the state has purported to vest in itself and which, through the medium of the corporation, it is attempting to enjoy."

The second source of authority on which Mr. Littman relies is the decision of the House of Lords in Government of India v. Taylor [1955] A.C. 491. That was a case in which the Government of India sought to recover sums alleged to be due in respect of Indian income tax and capital gains tax. It was, therefore, a straightforward claim for the direct enforcement of a foreign revenue law. The House of Lords refused to countenance the claim. The importance of the case from the present point of view is the approval given, by Lord Keith of Avonholme in particular, to the Irish case of Peter Buchanan Ltd. v. McVey reported as a note at [1955] A.C. 516. In that case the plaintiff company was owned and controlled by the defendant. The defendant felt aggrieved by a piece of retrospective legislation whereby he became personally liable to pay a large sum by way of tax. He thereupon devised a scheme to cheat the revenue. He procured the plaintiffs to dispose of all their considerable assets, and to pay their creditors out of the proceeds, save only the Inland Revenue. He then arranged for the balance of the proceeds, amounting to over <<PoundsSterling>>200,000, to be transferred to a bank in Dublin for the credit of his account. The Inland Revenue put the company into liquidation. The liquidator then brought an action against the defendant in the name of the company claiming back the balance of the proceeds as money had and received. The action failed. Kingsmill Moore J. referred in his judgment to Huntington v. Attrill [1893] A.C. 150; Banco de Vizcaya v. Don Alfonzo de Borbon y Austria [1935] 1 K.B. 140 and other cases and continued, at p. 527:

"Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced and that if the enforcement of such right would even indirectly involve the execution of the penal law of another state, then the claim must be

refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another state, and serve a revenue demand. There seems to me to be a reasonably close parallel between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the courts of this country, relief cannot be given."
He said, at p. 529:

"Nor is **modern history** without **examples** of **revenue laws used** for **purposes** which would not only affront the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests. Such laws have been used for religious and racial discriminations, for the furtherance of social policies and ideals dangerous to the security of adjacent countries, and for the direct furtherance of economic warfare. So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign states or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.

"If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign state or the representative of a foreign state or its revenue authority. In every case the substance of the claim must be scrutinised, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. Mr Wilson has pressed upon me the difficulty of deciding such a question of fact and has relied on 'ratio ruentis acervi.' For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction."
The judgment of Kingsmill Moore J. was subsequently affirmed in the Supreme Court of Eire. Lord Keith of Avonholm, who described the judgment as "admirable " and as containing "an able and exhaustive examination of the authorities, " summarised the effect of the judgment as follows Government of India v. Taylor [1955] A.C. 491 , 510:

"The judge held that the transaction was a dishonest transaction designed to defeat the claim of the revenue in Scotland as a creditor and was ultra vires of the company and accordingly rejected the defendant's submission. On the other hand, he held that although the action was in form an action by the company to recover these assets it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another state."
Viscount Simonds said, at p. 508:

"I must add that since writing this part of my opinion I have learned from my noble and learned friend, Lord Keith of Avonholm, that he has discovered a case in the courts of Eire which confirms the view I have expressed."
Lord Morton of Henryton and Lord Reid agreed with Viscount Simonds.

Mr. Brodie at first submitted that the House of Lords' approval of Peter Buchanan Ltd. v. McVey was limited to the speech of Lord Keith of Avonholm. However, it would seem from Viscount Simonds's reference to the case that the approval goes further than that. Secondly, Mr. Brodie submitted that the explanation of the case is that the company was in liquidation, and the liquidator was, in reality, as Lord Keith said, the nominee of the revenue. The effect of the company being put into liquidation was to break down the company structure. Since there were no other creditors but the Inland Revenue, it was, to all intents and purposes, a case of direct

enforcement.

Mr. Littman submitted in reply that the approval of the case given by the House of Lords was on a much broader ground. It did not depend on the company being in liquidation. It is, therefore, of direct application in the present case.

The third source of authority relied on by Mr. Littman are certain American decisions. I refer to only one, a decision of the United States Court of Appeals for the Second Circuit in Zwack v. Kraus Bros. & Co. Inc., 237 F. 2d. 255. In that case a Hungarian firm, J. Zwack and Co., was confiscated by the Government of Hungary. By Hungarian law a firm or partnership is regarded as a corporate entity. The individual partners have no rights in the firm's assets. The plaintiffs, being the former partners in the firm, brought an action on behalf of the firm against the defendants in order to recoup certain trade debts situated in the United States, and to recover certain trade marks. The defendants argued that the former partners could only claim for the wrongful confiscation of their shares; they could not claim the assets. The argument, which is not dissimilar from the argument advanced by the plaintiffs in the present case, is stated as follows at p. 258:

"[The defendant] urges that the transfer of the plaintiffs' shares of ownership was accomplished in Hungary by official acts of the Hungarian Government and therefore was not subject to collateral attack outside of Hungary even if confiscatory and therefore against the public policy of the forum."
The Court of Appeals rejected the defendants' argument, at p. 259:

"We think that, where firm assets existing in the forum are concerned, technical considerations as to the manner in which the foreign state seeks to expropriate them are not controlling. Prior to confiscation the assets of the firm both here and in Hungary were equitably owned by the plaintiffs as the sole partners in the firm. It is clear that the Hungarian Government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give the decree extra-territorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do."
The Zwack case has been referred to, and followed, in a number of subsequent American cases to which I need not refer.

Mr. Brodie submits that the United States cases do not help. In the first place, United States law takes, he says, a more relaxed attitude towards lifting the corporate veil. In the second place, he submits that the whole approach of United States courts towards foreign confiscatory legislation is different. Under their act of state doctrine they decline to inquire into foreign legislation at all unless enforcement within the United States conflicts with their public policy, whereas in England the distinction between "recognition" and "enforcement" is well established. I may not have done Mr. Brodie's second argument justice. I confess that I found it hard to follow why, if there is a difference in approach at all, it makes any difference in practice.

Finally, I should return briefly to the question of machinery. Assuming that our courts would always allow a foreign company (as it surely would) to collect its English assets in order to satisfy its ordinary trade creditors, but not so as to satisfy, directly or indirectly, a claim by the foreign state, how, in practice, could this be achieved? Dr. Mann suggests, and Mr. Littman adopts, as a possible solution - perhaps the only solution - the appointment of a receiver of the English assets. This would be similar to the solution eventually adopted by our courts in the Russian bank cases, where the foreign company had been dissolved by the law of the place of incorporation, leaving behind assets in this country. Mr. Brodie riposted that the court would have no jurisdiction to appoint a receiver in view of the decision of the House of Lords in Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210

Such, then, were the arguments advanced on

both sides. I now return to R.S.C., Ord. 18, r. 19. I refrain from expressing any view whether the defence under paragraph 6(c) of the trade marks action is likely or unlikely to succeed; for that is not the question. The question is whether it is arguable. The judge has held not; otherwise he could not have made the order under Ord. 18, r. 19. I am bound to say that, with great respect to the judge, and the majority of this court, I take a different view.

The language of Ord. 18, r. 19 goes back in large part to the old Ord. 25, r. 4 which came into force in 1883 on the abolition of demurrer. Ord. 25, r. 4 then provided:

"The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Two things are to be noted. First, the power to strike out was, and still is, discretionary. Secondly, the power only arises if the pleading disclosed no reasonable cause of action or defence.

There have been many cases since 1883 in which the words "reasonable cause of action or defence" have been glossed. In one of the earliest, Metropolitan Bank Ltd. v. Pooley (1885) 10 App. Cas. 210, 214-215, the Earl of Selborne L.C. said:

"But when the rules of 1883 were settled and came in force, which they did before the present action was brought, it was thought that the formal and technical practice of demurrer might with advantage be abolished, and that more easy and summary, or at least equally summary, modes of applying to the court to get rid of an action on the face of it manifestly groundless, might be substituted."

A number of subsequent cases are collected in Stephenson L.J.'s judgment in McKay v. Essex Area Health Authority [1982] Q.B. 1166 , 1176. He refers to Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co. [1892] 3 Ch. 274, 277 "obviously unsustainable;" Dyson v. Attorney-General [1911] 1 K.B. 410, 419 "obviously and almost incontestably bad;" Nagle v. Feilden [1966] 2 Q.B. 633, 651 "unarguable;" Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149, 171 "quite unsustainable; " Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019, 1027 "hopeless."

In Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688 the majority of the Court of Appeal, Lord Denning M.R. dissenting, refused to strike out a defamation action. It was not plain and obvious that the claim must fail. The use of the paraphrase "plain and obvious" may possibly be misleading. Many cases that come before the courts - I might almost say most - become plain and obvious once the arguments on both sides have been heard. It then becomes plain and obvious that the arguments of one side or the other are to be preferred. But that does not mean that all such cases would have been suitable for disposal under the summary procedure provided by Ord. 18, r. 19. Certainly I do not detect in Lord Pearson's judgment in Drummond-Jackson v. British Medical Association any suggestion that he was intending to relax the old practice. That is clear from other passages in his judgment, and also from his observation, at p. 696, that the plaintiffs should not be "driven from the judgment seat" (or deprived of a defence) "unless it is quite plain that his alleged cause of action has no chance of success." If it has some chance of success, striking out is not merely not appropriate, which may depend on the circumstances, but not even permissible.

Of course, the question whether it is plain and obvious that the point must fail, or, as I would prefer to say, whether the point is unarguable, may not be apparent on a mere examination of the pleadings. It may take the court some time, perhaps a considerable time, to appreciate what the point is. Therefore, the mere fact that the question cannot be answered at once on looking at the pleadings does not necessarily mean that the case is not one for striking out. That is all, I think, that

Sir Gordon Willmer had in mind when he said [1970] 1 W.L.R. 688, 700:

"The question whether a point is plain and obvious does not depend on the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result."

If Sir Gordon Willmer meant more than what I think he meant, then I would respectfully disagree. A case in which there are solid arguments to be advanced on both sides is not suitable for the summary procedure under Ord. 18, r. 19. It may be suitable for the trial of a preliminary point of law under R.S.C., Ord. 18, r. 11 and Ord. 33, r. 3 depending on the circumstances. But it is not suitable for striking out.

I now return to McKay v. Essex Area Health Authority [1982] Q.B. 1166, another case in which the Court of Appeal was divided. From what I have said it will become apparent that my sympathies lie with the dissenting judgment of Griffiths L.J. The majority held that it was a proper case for striking out for the special reasons mentioned by Ackner L.J., at pp. 1186-1187. These were in brief that (i) a claim for "wrongful life" was a wholly novel claim, unsupported by English authority; (ii) the American authorities, with one exception, were opposed to any such claim, and the plaintiffs did not seek to justify the reasoning in the one exceptional case; (iii) the Law Commission were opposed to any such claim, and (iv) the case raised no point of general public importance, in view of the subsequent enactment of the Congenital Disabilities (Civil Liability) Act 1976. It was in truth a "one-off" case. None of these four features are, as it seems to me, present here.

Griffiths L.J. regarded the case as unsuitable for striking out. Stephenson L.J., as I have already mentioned, only reached his conclusion after anxious consideration. He said, at p. 1177: "I think that the right decision must be in favour of the course which on balance does the better justice." He referred to an observation of Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, 696 where, after referring to some recent cases, he said:

"There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the courts to adopt this unusual procedural method in special cases where it is seen to be advantageous."

With respect, this again may possibly be misleading. There is no discretion to adopt the procedure under R.S.C., Ord. 18, r. 19, however advantageous it may be in saving costs or in other ways, unless it can truthfully be said that the point is unarguable.

Griffiths L.J. in his judgment [1982] Q.B. 1166, 1190, referred to changing times and the increasing pressure on the courts: "The courts must and do adapt their procedures to cope with these new pressures." I would myself doubt whether the pressure on the courts is a good reason for relaxing the old practice under Ord. 18, r. 19. After all, the words are still the same. The question has all along been whether the pleading discloses a reasonable cause of action or defence, as the case may be. The pressure on the courts cannot alter the meaning of the words, and should not, as I see it, alter the practice. In another passage Griffiths L.J. says, at p. 1190:

"Today, in an appropriate case, the mere fact that a substantial and not frivolous argument can be presented to support a novel cause of action is not of itself sufficient to require a judge to exercise his discretion in favour of refusing to strike out..."

Again, with respect, that may go too far. If there are substantial arguments in favour of a novel cause of action, then I do not see how such a cause of action, novel though it be, can be regarded as unarguable. As I have already said, the novelty of the cause of action may make it suitable for a preliminary point of law. But, so long as there are substantial arguments in support of the cause of action, it cannot be suitable for the summary procedure

under Ord. 18, r. 19.

I have referred above to my preference for the test under Ord. 18, r. 19 being whether the point is arguable. There is good authority for use of that paraphrase. But there is the additional advantage that it is a test with which all masters and judges are familiar when dealing with applications under Order 14. There is obvious convenience in applying the same test whichever of the two methods of summary disposal is sought by the plaintiff.

Returning to the judgment, the judge refers, ante, p. 378D-E, to the plaintiffs' objective as being to save time and expense and, in particular, to avoid the investigation of various questions of Spanish law at the trial. These are laudable objectives; they might well provide a ground for ordering a preliminary point of law. But they do not help us decide nor, I suspect, did the judge regard them as helping him decide whether paragraph 6(e) discloses a reasonable defence. As for the other objective mentioned by the judge, namely, that the plaintiffs were unwilling that this court should become the forum for the discussion of any question of Spanish domestic policy, I do not see that any question of Spanish domestic policy will arise other than what may be necessary to determine whether the decrees are penal. This is inherent in any case in which the court is being asked to refuse to enforce a foreign penal decree.

For the reasons I have given, I would myself decline to hold that paragraph 6(e) of the defence in the trade marks action discloses no reasonable defence.

I would reach the same result in relation to the proposed paragraph 15 of the defence in the Multinvest action. Indeed, the arguments advanced by Mr. Littman are, if anything, somewhat stronger in relation to the Multinvest action. I would, therefore, allow the appeals in both cases.

I differ from the judge with great reluctance. But he did not have the advantage of the same full citation of the views of Dr. Mann, and the American authorities, as we have had.

I concede at once that to allow the appeals would be an unsatisfactory result after lengthy hearings both here and below. But, in my view, there are more important questions involved here than the costs in this particular case. I have in mind not only the questions raised by paragraphs 6(e) and 15 of the defences, but also the proper application of Ord. 18, r. 19.

SIR JOHN MEGAW.

I agree with Fox L.J. that the appeals should be dismissed for the reasons given by him and by Nourse J. at first instance.

Further, the substance of the issue sought to be raised by the defendants, at least in the first action, is that those who have purported to give instructions for the action to be brought in the name of the plaintiff company did not have authority so to do. This is an issue which, upon clear and binding authority, cannot be raised by way of defence.

Appeals dismissed with costs. Leave to appeal on terms. (C. N. )

Solicitors: Denton Hall & Burgin;Herbert Smith & Co.

APPEALS from the Court of Appeal.

The appeal in the first action was by the defendants, W. & H. Trade Marks (Jersey) Ltd., Jose Maria Ruiz Mateos, Zoilo Ruiz Mateos, Rafael Ruiz Mateos, Isidoro Ruiz Mateos, Alfonso Ruiz Mateos and Dolores Ruiz Mateos from a decision dated 3 April 1985 of the Court of Appeal, ante, p. 389D (Fox L.J. and Sir John Megaw, Lloyd L.J. dissenting) dismissing their appeal from Nourse J., ante, p. 375D who on 19 December 1984, in an action brought against them by the plaintiffs, Williams and Humbert Ltd., struck out under R.S.C., Ord. 18, r. 19, paragraph 6(e) of the defence whereby it was alleged that the plaintiffs were not entitled to the relief sought or any relief

"by reason of the fact that these proceedings represent an attempt to enforce a foreign law which is penal or which otherwise ought not to

be enforced by this court, and further or alternatively that it would be contrary to public policy to grant the relief sought or any relief."

The appeal in the second action was by the third defendant, Jose Maria Ruiz Mateos, from a decision dated 3 April 1985 of the Court of Appeal, ante, p. 389D (Fox L.J. and Sir John Megaw, Lloyd L.J. dissenting) dismissing his appeal from Nourse J., ante, p. 375D who on 19 December 1984 refused leave to amend the defence in an action brought by the plaintiffs, Rumasa S.A., Banco de Jerez S.A. and Banco del Norte S.A.

The Court of Appeal granted leave to appeal in both actions.

The facts are stated in the opinion of Lord Templeman.

Mark Littman Q.C., Robert Reid Q.C. and Simon Berry for the defendants in the first action.

Mark Littman Q.C., Robert Reid Q.C. and W. R. Stewart Smith for the third defendant in the second action.

Mark Littman Q.C. In both courts below these cases have been heard together as they raise essentially the same point of principle and the two cases have a common background of facts. There are, however, certain different issues of fact and certain minor differences in the questions of law between the two appeals. It is proposed to deal first with the appeal in the second action, namely, the Rumasa case, since it raises in a more simple and direct form the main issue in these appeals.

There are two broad submissions: (1) The first is really a preliminary point and if it is decided in the appellant's favour, it must follow that the second does not arise. The submission is that the procedure adopted in both courts below is not in accordance with R.S.C., Ord. 18, r.19, and is in fact a fundamental misapplication of that Rule for the following reasons: (i) There is only jurisdiction to strike out a defence under this rule where plainly it discloses no reasonable ground of defence. (ii) It must have been obvious to the courts below, and was obvious, that there were and are reasonable arguments in favour of the defence, the resolution of which could not be dealt with without substantial argument. (iii) As soon as this became obvious the court should have disposed of the matter. (iv) At that point the defence had a right to have the application dismissed and the court had no jurisdiction to do anything else, in particular, no jurisdiction to go on to hear the whole argument as it did.

(2) If the appellants are wrong on their first submission and it was right for the courts below to hear the full argument, then they should have held that the respondents had not made out their case that the appellants had no reasonable defence and the application under Ord. 18, r.19 should have been dismissed.

On an application under R.S.C., Ord. 18, r.19, to strike out part of a defence the facts have to be taken as alleged in the defence.

The pleaded facts can be briefly summarised as follows: (a) The plaintiffs in both actions are in substance attempting to enforce the rights acquired by the State of Spain under the expropriation of the shares of Rumasa and its Spanish subsidiaries which were formerly owned directly or indirectly by Jose-Maria Ruiz-Mateos ("Mateos") and his siblings. The expropriation laws have done away with the usual means of control of a Spanish company by shareholders and directors and vested control of Rumasa directly in organs of the State of Spain. Accordingly, Rumasa is itself an organ of the State of Spain. Williams & Humbert Ltd. is a wholly owned subsidiary of Rumasa. If it was not for the expropriation, then these actions would not have been brought. (b) The expropriation laws were penal. The recitals to the laws reveal that the purpose of the laws was (i) the vindication of the public justice and (ii) to effect a forfeiture by divesting Mateos of the Rumasa Group on the ground of his alleged unfitness to control its assets. Reliance is also placed on analogous penal provisions in certain Spanish Banking Laws and Decrees, the Spanish Penal Code and the Spanish 1954 Law ofCompulsory

Expropriation ("the 1954 Law"). (c) The expropriation laws were discriminatory. They were directed solely at and had application only to Mateos and his siblings. Apart from nationalisation measures, the use of special laws to effect an expropriation in Spain whether against a particular individual (as in this case) or not is unprecedented. No use was made (as could have been done) of the 1954 Law which provided for (as the expropriation laws did not) a fair and just means of compulsory acquisition. (d) The expropriation was confiscatory. Reliance is placed in particular on the following: (i) possession was taken without notice and by force and no opportunity was given under the expropriation laws (as would have been available under the 1954 Law) to oppose the validity or need for the expropriation in advance; and (ii) the manner in which the expropriation was implemented, the denial of access for Mateos to all relevant records books and papers relating to the affairs of the Rumasa Group (both financial and general) and the special compensation provisions contained in the expropriation laws rendered illusory the purported right to compensation given by the expropriation laws. (e) The action is brought by or at the instigation of the Spanish company which is now an organ of the State of Spain.

R.S.C., Ord. 18, r.19, is only meant to deal with plain and obvious cases. Before Nourse J. counsel for the plaintiffs opened for some three days. This ipso facto shows that the defence was an arguable point of law. It is emphasised that the English courts will not enforce directly or indirectly penal laws of the class of the Spanish decree law. It is a matter of high public policy and also a question of jurisdiction. This case involves the indirect enforcement of a foreign penal law. The above principle is apt to include a case where in consequence of a penal law a foreign government is placed in possession of the shares of a company and is therefore in a position to bring an action by means of that company. If the action succeeds and the foreign government obtains the benefit of the fruits of the action, they have to be applied in accordance with the provisions of the penal law. This amounts to an indirect enforcement of it. If this were held not to be so, it would make a large and serious breach of the principle against the enforcement of penal laws. It is conceded that the present argument goes further than the judgment of Griffiths L.J. in McKay v. Essex Area Health Authority [1982] Q.B. 1166, 1191 where he stated that there may be a special case where it would be right for the judge to hear substantial argument relating to the application under Ord. 18, r. 19. There are no special cases, and even if there are, the present is not one of them since, inter alia, this is not a one-off case. The granting of the plaintiffs' application will not decide the action.

An applicant should not apply to strike out under R.S.C., Ord. 18, r. 19, unless he feels able to put forward a case that the defence is unarguable. The applicant should be able to put this point within, say, two hours. If the court considers that a prima facie case has been made out then the proceedings may take a little longer but, again, the defendant's submission should not take long and this again applies if the applicant is called upon to reply. As Lloyd L.J. observed ante, p. 410F-G the question for the purposes of Ord. 18, r. 19 is not whether the defence under paragraph 6(e) of the trade marks action is likely or unlikely to succeed but whether it is arguable. This particular rule does not allow a demurrer to be made. The point of time at which the question is to be determined whether it is arguable is at the beginning rather than towards the end of the debate. The majority of the Court of Appeal did not find that the point was unarguable but that, albeit it was arguable, it was wrong: see ante, p. 399D-H. The fact that Nourse J. and the Court of Appeal heard the argument at length demonstrates ex hypothesi that the argument is substantial and far from being unarguable. Reliance is placed on the judgment of Lloyd L.J., ante, pp. 413C - 414A The practice adopted below is not consonant with Ord. 18, r. 19. Reliance is placed on the approach adopted by this House in American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396. In the present case there has been a fundamental misapplication of R.S.C., Ord. 18, r. 19. The

present issue did not involve a preliminary point of law. If there had been an application for a preliminary point of law to be set down, it would have been refused. In the present case it is the defendant who has been prejudiced because he has been deprived of a trial. The trial of a preliminary issue is part of the trial of the matters in dispute between the parties. It only means that certain aspects of the trial are heard separately. If the practice adopted in the courts below in the present case of dealing with an application under Ord. 18, r. 19 is approved by this House, it constitutes a neat way of obviating the requirements of R.S.C., Ord. 33, r. 3 relating to the setting down of a preliminary point of law.

There are the following differences between R.S.C., Ord. 33, r. 3 and R.S.C., Ord. 18, r. 19: (i) Proceedings under r. 3 constitute a trial, not merely an application; (ii) Proceedings under r. 3 must terminate with an order of the court: see Note 1 to R.S.C., Ord. 33, r. 3 in the Supreme Court Practice (1985), p. 156; (iii) The decision on a preliminary issue is a final decision. It becomes res judicata. The two rules must not be confused. In Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853, the House indicated, at p. 881, that the plea in question in that case raised a substantive defence which should not be argued on a summons to stay the proceedings on the ground that they had been commenced without authority, but remained open in the action. Lord Reid, at p. 924G, described it as "an important question," and Lord Wilberforce, at p. 962G, said that the issue "which may be a substantial and difficult one" could not properly be decided on the appeal. That approach should be adopted in the present case.

If the House is against the defendant on the first issue, then (2) the question arises whether on the facts pleaded there is an arguable defence that the plaintiffs' action, if successful, would involve direct or indirect enforcement of a penal law. This is an issue of great public importance and as stated previously goes also to the question of jurisdiction. The Court of Appeal, ante, p. 394C-D, accepted Rule 3 of Dicey & Morris, The Conflict of Laws, 10th ed. (1980), vol. 1, pp. 89-90, that it is a principle of English law that our courts: "have no jurisdiction to entertain an action: - (1) for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign state; or (2) founded upon an act of state. " The action was brought by Rumasa as to which it is pleaded and was accepted by Nourse J., ante, pp. 377H - 378A, that the company was an organ of the Spanish government. Shares in the plaintiff companies were transferred from the Mateos family to the Spanish government. As Lloyd L.J. correctly observed, ante, p. 402F-G, the defendants concede that the Spanish decrees were effective to transfer ownership of the shares. Further they do not challenge the propositions of law stated by Fox L.J., ante, pp. 392F - 394B.

A distinction must be drawn between foreign laws which the English courts will not recognise and foreign laws which the English courts, although they will recognise them, will not assist in their enforcement. As to penal or public laws, it is sufficient for the purposes of the present case if the laws in question come within the specified category; in other words, laws which the English courts will recognise but will not directly or indirectly enforce. The above is a principle which runs across and runs counter to the ordinary principles of the conflict of laws. There is no direct English authority relating to the situation where the foreign legislation expropriated not the assets but the shares of the foreign company. The defendants do not challenge the propositions: (i) that the title to the shares has been effectively transferred to the Spanish government who have taken possession and title to the property in Spain which the English courts will enforce on the principle of Princess Paley Olga v. Weisz [1929] 1 K.B. 718 and Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532. (ii) Spanish company law must be taken to be the same as English company law except in so far as it is otherwise pleaded. The only difference pleaded is the effect of the decree on the organs of the company and therefore it must at least be assumed that a Spanish company is in the same position as an English

company, namely, that it is a separate legal person and that its property is the property of the company and not of the shareholders. Further, that the company does not hold its property as agent for the shareholders: see Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248, 249 et seq., 269, per Devlin J. (iii) The defendants further accept that what the plaintiff company seeks to recover is according to them the company's own property and it was their own property before the passing of the Spanish decrees and therefore the company's property in England does not depend on the Spanish legislation. If these matters were put before a court, it is accepted that the defendants would have a case to answer. The defendants' affirmative case is that the above three undisputed matters contravene the principle that to accede to the plaintiffs' action would involve directly or indirectly the enforcement of a foreign penal law.

Reliance is placed on the following matters in relation to this issue: Government of India v. Taylor [1955] A.C. 491 which approved the decision of Kingsmill Moore J. which is reported as a note (at p. 516) to the Government of India case; Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629 and the American decision of Zwack v. Kraus Bros. & Co. Inc. (1956) 237 F. 2d 255. Strong reliance is also placed on two articles written by Dr. F. A. Mann, namely, "The Confiscation of Corporations, Corporate Rights and Corporate Assets and the Conflict of Laws" (1962) 11 I.C.L.Q. 471, 490-493, and "Conflict of Laws and Public Laws" (1971) 132 Recueil des Cours 108, 176-180 (Hague Lecture on International Law) which the defendants wish to adopt as part of their argument. The above passages are referred to in the judgment of Lloyd L.J., ante, pp. 403A - 407D.

The principle is regarded by the law as an exraordinarily important principle, not only as to jurisdiction but one of public policy: see In re Claim by Helbert Wagg & Co. Ltd. [1956] Ch. 323, 349, 350, per Upjohn J. The observations of Lord Denning M.R. in Attorney-General of New Zealand v. Ortiz [1984] A.C. 1, 19C-E, 20B et seq., 23E, would apply equally to property under the control of the Soviet government. The position would be different if the property had not been reduced into possession by the Soviet government, for example, if the Soviet government had passed a decree confiscating the jewellery in question but Princess Paley Olga had smuggled it out of Russia to this country. In those circumstances the Soviet government would not have recovered it by bringing proceedings for that purpose in England.

Although the defendants as stated above concede certain questions of fact, those facts alone do not decide the matter against the defendants. The court has to look at the substance of the action. A Spanish company was bringing the action in England in relation to property in this country, that is outside Spain and property which was never in Spain. The action has been brought by the company at the instigation of the Spanish government. The Spanish government has been placed in a position in which it can cause this action to be brought by virtue of the expropriatory decree. If the claim succeeds the property will be brought under the possession and control of the company. It is under the control of the Spanish government. In so far as that property is not required to pay creditors it will enure to the benefit of the Spanish government. When the Spanish government, via the plaintiffs, obtains that possession and control, it will then hold the property for the purposes of those decrees. By virtue of these undisputed facts the case comes within the principle of the indirect enforcement of a penal law.

The principle is: even where the action is in the form of a legal person separate from that of the foreign government and even where the claim in the event does not depend for part of its title on the public law in question, nevertheless, if the action is being enforced at the instigation of a foreign authority and would indirectly serve the claims of that foreign authority, relief in the above circumstances will not be given: see Government of India v. Taylor [1955] A.C. 491 , 508 approving the statement of principle in the Irish case of Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 516, 523 et seq.,

533. As to the Buchanan case, the decision shows that the simplistic answer to the defendant's case does not work. Further, it cannot be said that the approval of Buchanan in Government of India v. Taylor [1955] A.C. 491 was confined to Lord Keith of Avonholm. It was approved by four of their Lordships. The Buchanan case (Note) [1955] A.C. 516 was followed in Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352 and Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476, 482F et seq.

There is no doubt that if the assets of the Spanish company were in this country and the Spanish government had taken over the company, the Spanish government could not have recovered under the decree. Can it make any difference that the Spanish government has taken over the shares of the Spanish company? The answer is manifestly in the negative. The question in both cases is: What is the substance of the action that the company is trying to bring in this country?

Below, the plaintiffs endeavoured to explain away the relevance of the decision in Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 516 on the ground that that company was in liquidation, and the liquidator was, in reality, the nominee of the revenue: see ante, p. 409C-D, per Lloyd L.J. But the action in the Irish court, although instigated by the liquidator, was an action by the company and not by him (reference was made to the Supreme Court Practice (1985), vol. 2, para. 4666). It is emphasised that if the foreign government is not allowed to come to the English court to enforce legislation directly, it cannot do so indirectly. As to Fox L.J.'s, ante, p. 395D-F, explanation of the difference between the Buchanan case (Note) [1955] A.C. 516 and Government of India v. Taylor [1955] A.C. 491, and the present case, his answer would be correct if the issue in this case was the title to the shares. But the issue here relates to property in England and the English court is being asked to assist the plaintiffs to recover it. As to the Spanish decrees, the majority of the Court of Appeal's construction of them is far too narrow. The purpose of the decrees was to obtain control of all the assets of this group of companies in and outside Spain and the present action by the company was brought in pursuance of that purpose. Kingsmill Moore J.'s judgment in the Buchanan case (Note) [1955] A.C. 516 is correctly analysed in the argument for the plaintiff in Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140, 141. In Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629, Romer J. treated the proceedings not as a class 1 case but as a class 2 case, and held that the Austrian decree in question was a penal law and that the English courts could not assist in establishing the claim to property which was, and always had been, situate within the jurisdiction of the English courts.

The defendants wish to emphasise their reliance on the articles of Dr. Mann referred to previously. The writings of Dr. Mann were referred to by this House in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853 where the point relevant to this case referred to in the Zeiss case was stated to be one of substance and importance. The writings of Dr. Mann are also referred to by Lord Denning M.R. in Attorney-General of New Zealand v. Ortiz [1984] A.C. 1

With regard to machinery, Dr. Mann accepts that the rights of creditors have to be safeguarded. It is a question of fact to be tried whether a particular claim is brought for the purpose of completing a foreign confiscation, in which case it will be rejected, or for some other purpose, in which case it will be allowed. If the purpose is mixed the court will adapt its procedures so as to ensure both that the foreign sovereign does not benefit from the action while creditors for the claimant are provided for. In cases of difficulty the court can appoint a receiver for the purpose of applying assets in accordance with these principles. The court may appoint a receiver in all cases in which it appears just and convenient to do so: Supreme Court Act 1981, s. 37(1), which replaced the Supreme Court of Judicature (Consolidation) Act 1925, s. 45(1). For an explanation of the meaning of the words "just and equitable" in relation to the winding up of a company, see In re Westbourne Galleries [1973] A.C. 360, 379A-

B, per Lord Wilberforce.

As to the effect of the Civil Jurisdiction Act 1982, Schedule 1, Articles 1, 27, 31, 34, if English law is such that the foreign law would be recognised but not enforced under the rules of private international law as administered by the courts, this Act would not enable the Spanish government to enforce any judgment in their favour if the case came to trial.

Helpful guidance can be obtained from the American authorities and in particular from the decision of the United States Court of Appeals second circuit in Zwack v. Kraus Bros. Inc. (1956) 237 F. 2d 255, which has been referred to with approval and followed in a number of subsequent cases, for example, F. Palicio y Compania S.A. v. Brush (1966) 256 F. Supp. 481. These cases show that in the United States the technical means whereby the foreign state attempts to reduce into its possession assets within the United States are irrelevant and that in the United States the plea sought to be raised in this action would succeed. Fox L.J. ante, p. 399B-C, was wrong in distinguishing the decision in the Zwack case, 237 F. 2d 255, on the ground that there was a finding that the plaintiffs were "the equitable owners" of the property in question. The property belonged to a Hungarian firm which was by Hungarian law a corporate body. The court found that the individual partners had no interest in its assets. In the light of this finding the words "equitable owners" in the passage cited by Fox L.J. were clearly not being used in their strict sense. Even if this was correct in relation to the facts of that case, the principle is a general one: see Maltina Corporation v. Cawy Bottling Co. Inc. (1972) 462 F. 2d 1021, 1024, 1026, 1027.

As to the meaning of "enforcement" the concept can be given a narrow or a wider meaning. If it is given too narrow a meaning that would mean that the Buchanan case (Note) [1955] A.C. 516; Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629 and Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140 were wrongly decided.

If the decision of the Court of Appeal is upheld, it will involve emasculating this important principle of public policy that the English courts will not directly or indirectly enforce penal or revenue laws of a foreign country. For a consequence of an acceptance of the decision below, see the example given by Kingsmill Moore J. in the Buchanan case (Note) [1955] A.C. 516, 529, 530. In the application of the principle of direct or indirect enforcement it may in certain circumstances be necessary to pierce the corporate veil in order to ascertain for whose benefit the action was brought, as was done in the Buchanan case: see Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd. [1916] 2 A.C. 307, 338, 340, 341; Part Cargo ex M.V. Glenroy [1945] A.C. 124, 137; Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [1955] 1 W.L.R. 352, 367; Baccus S.R.L. v. Servicio Nacional del Trigo [1957] 1 Q.B. 438, 466, 467, 473; Merchandise Transport Ltd. v. British Transport Commission [1962] 2 Q.B. 173, 206, 207 and In re Westbourne Galleries Ltd. [1973] A.C. 360, 379A-B.

As to whether the defendants raised an arguable point, reliance is placed on observations made by their Lordships in the Carl Zeiss case (No. 2) [1967] 1 A.C. 853, 924, 962, 963. As to the plaintiffs' argument, it is emphasised that the issue here does not relate to the title to the shares of the company, but to property which is situate in this country. The issue reduces itself to the question whether the English court will indirectly enforce foreign penal laws. It is said that the claim by the company is to its own property, but this is to take too narrow a view of the applicable principle: see the Buchanan case (Note) [1955] A.C. 516. It is suggested that the present case is governed by Princess Paley Olga v. Weisz [1929] 1 K.B. 718 and Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532. Those cases would be relevant if the issue here was the title to the shares, but this is not so; it relates to the enforcement of rights concerning property situate in England. Compare Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476. Moreover, the Princess Paley Olga case [1929] 1 K.B. 718 and Luther v. James Sagor & Co. [1921] 3 K.B. 532 were not concerned with

corporations.

An English court will not recognise foreign laws which constitute so grave an infringement of human rights that they ought not to be recognised as laws at all: Oppenheimer v. Cattermole [1976] A.C. 249, 278A et seq., per Lord Cross of Chelsea; 281H et seq., 283D-F, per Lord Salmon. The defendants seek to raise the question whether the character of the laws, being in effect a confiscation of the property of the Mateos family without any prior charge or indictment, without trial and without the normal provisions for compensation and other safeguards (contained in the Law of Compulsory Expropriation of 16 December 1954) amounted in effect to an Attainder without trial and was so offensive to English concepts of public policy that in accordance with the principle stated in Oppenheimer v. Cattermole the laws should not be recognised at all. Fox L.J., ante, p. 392D-E, was in error in recording that the defendants conceded that the laws were not of this character. They reserved their position on the question, while conceding that on the evidence at present available to them, as to the character, origin and purposes of the laws, they were not yet able to establish that they were. They contended and still contend, however, that they ought to have an opportunity of establishing this at the trial if the evidence then available to them so permits.

To the question, if a receiver is appointed of a company, on sale of the assets, who receives the surplus, if any, after the creditors have been satisfied: see In re Banque des Marchands de Moscou (Koupetschesky) [1958] Ch. 182, which suggests the proposition that the surplus does not go to the foreign government but to the contributories.

To summarise the defendants' argument: (1) It is an undoubted principle of English law that our courts will not enforce directly or indirectly the foreign laws of a specified class, i.e. penal, revenue, confiscatory or other public laws as regards property in this country at the date the foreign law came into existence. (2) The defendants allege in their pleadings that the decrees in question are within this class as being penal, confiscatory and discriminatory and the application to strike out must be determined (as the courts below held) on the footing that this is so, or at least arguable. (3) The property in question here and being claimed by the plaintiffs is property which was at the date of the enactment of the decrees and at all times since situate in this country. (4) The action is brought at the instigation of the Spanish Government in the sense that the Spanish Government has caused the action to be brought and that it has in fact been brought by and for the benefit of organs of the Spanish Government. The Court of Appeal and the judge accepted that the application must be dealt with upon this footing. (5) If the action succeeds the property in question will come under the control of these organs of the Spanish Government. (6) It is by virtue of the decrees in question that the Spanish Government has been placed in the position to bring about the present actions by placing the plaintiff companies under their control. Furthermore, the defendants allege that the benefit of the action, i.e. the property recovered, will be held by the plaintiff companies and directly or indirectly by the Spanish government under and for the purpose of those decrees; and for the purpose of the present application this must be assumed to be the case. (7) These facts are sufficient to bring the case within the principle which was correctly stated by Kingsmill Moore J. in a judgment approved in this House, namely that the courts of this country will not as regards property in this country at the relevant date give relief where the action is being enforced at the instigation of a foreign government and will indirectly serve claims of that government of such a nature as are not enforceable in these courts. This principle was the ratio of that case and the present case cannot be decided adversely to the appellants without withdrawal of the approval given by this House to that decision. The ratio is the same in substance as that which was the basis of the U.S. decision in Zwack, 237F, 255, in a case where the ownership of a corporate entity was taken. The American decision is relevant because

although there are differences between U.S. and English law in this field those differences are not material or relevant in the present instance since in the United States as in this country it is a principle of public policy that the courts of the forum will not enforce directly or indirectly a confiscatory (or for that matter penal or revenue) law of a foreign country except as regards property within the jurisdiction of that country at the relevant time and where the confiscatory decree has been brought to complete fruition. The English rule as regards public policy and even jurisdiction is not less wide than the U.S. rule but in fact probably wider (see Lord Cross of Chelsea in Oppenheimer v. Cattermole [1976] A.C. 249). (8) It is as true in England as it is in the United States that to hold that a foreign government can by taking shares (or by appointing a receiver or custodian) achieve indirectly what it cannot and is not allowed to achieve directly by taking of the assets for a proscribed purpose would be in large measure to emasculate the public policy of the forum by providing foreign governments who wish to evade such policy with a wide range of possibilities for doing so, either by vesting of shares of companies or by appointing receivers, custodians or interventors. (9) There is nothing in English company law which requires the court to shut its eyes to the fact that although a company brings an action it may be doing so at the instigation of a foreign government which is its shareholder and of which it is in substance an organ; and neither is there anything in such law that requires the court to shut its eyes to the fact (if it be proved to be so at the trial of the action) that the action will "indirectly serve the claims of the government" of a penal or confiscatory nature. (10) The question whether the action will indirectly serve the claims of the government of such a nature as distinct from the claims of creditors is a question of fact for the trial and must now be assumed in the defendant's favour. (11) The principle for which the defendant contends does not involve the disappointment of creditors since the defence will fail if property is required for creditors. This is to be contrasted favourably with cases where the government takes property without adequate compensation and where the property in this country is successfully taken by the foreign government for its own purposes and may not be available for the satisfaction of the claims of creditors. (12) Upon the application of this principle debtors will continue to have to pay their debts to the companies if they are required for creditors and that accordingly the possibility of a windfall for debtors only arises where the choice is between a windfall for the debtors and the satisfaction of a claim by a foreign government for a proscribed purpose, in which case public policy dictates that the former is the lesser evil. (13) If there is any uncertainty after trial as to whether the action will serve the penal claims of the Spanish government or the needs of creditors, this does not present the court with an insoluble problem. There is adequate machinery available to the court by way of the appointment of a receiver to solve such a practical problem. The experience of the Russian Bank in Russian and English Bank v. Baring Brothers & Co. [1936] A.C. 405, 439 shows that novel problems of this kind inevitably arise from foreign confiscations and the English courts will not shrink from facing up to such problems and finding practical solutions to them. (14) The course of the argument in all courts and in this House demonstrates that the present case is remote from the intention of R.S.C., Ord. 18, r. 19(1)(a) and to hold that such a case is within the scope of that rule is not only wrong in principle but would be productive of bad practice in future cases.

Reid Q. C. following. The essence of the decision in the present appeals comes within the Buchanan case (Note) [1955] A.C. 516. The courts will look at the substance of the foreign decree to see whether it is, in effect, confiscatory. On the facts of that case, the defendant McVey had defrauded the company of a very substantial sum of money so that it was unable to pay its tax liability to the revenue. As to the company's shareholding, 99 per cent. was held by McVey and one share was held by a Miss Farquharson as a nominee. The liquidator was only concerned to get in the company's assets and to distribute them according to law, to unpaid creditors and as to the surplus to shareholders on the register.

Kingsmill Moore J. held that the court had to look at the realities which were that this was an action to enforce a foreign revenue law. The court did not confine itself to technicalities but looked at the substance. The principle of the Buchanan case covers the present case. Similarities between that case and the present case are striking. The two cases are really on "all fours." The present problem can be considered in a broader way than was postulated by Dr. Mann in the articles cited. The question to be asked is: What is the purpose of the action? Would the action have been brought but for the confiscation? If the action would have been brought anyway - e.g. against a merchant who had not paid for the shares he had had - the action cannot be considered as an attempt to enforce a foreign law and does not fall foul of the rule.

Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629 was argued as a class 2 case. It was not a revenue case but not a confiscation case. Possibly, in the present day, it would be argued as a class 1 case but it was in fact decided as a class 2 case. What is being attempted in the present case for the Spanish government is indirectly to enforce the Spanish confiscatory legislation just as in the Buchanan case an attempt being made to enforce a foreign revenue law and in Frankfurther an attempt being made to enforce a confiscatory law. If the Spanish government obtain the trademark they obtain the most valuable asset of Williams & Humbert Ltd. which was outside their grasp when the Spanish government confiscated the shares of the companies in Spain. [Reference was also made to F. Palicio y Compania S.A. v. Brush, 256 F. Supp. 481.]

C. A. Brodie Q.C., Alan Steinfeld and Daniel Gerrans for the plaintiffs in both actions were not called upon.

Their Lordships took time for consideration.

12 December. LORD SCARMAN

My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends, Lord Templeman and Lord Mackay of Clashfern. I agree with both of them: and for the reasons which they give I would dismiss the appeals

LORD BRIDGE OF HARWICH

My Lords, for the reasons given in the speeches of my noble and learned friends, Lord Templeman and Lord Mackay of Clashfern, with both of which I agree, I too would dismiss this appeal.

LORD BRANDON OF OAKBROOK

My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Mackay of Clashfern. I agree with both, and for the reasons which they give I would dismiss the appeal.

LORD TEMPLEMAN

My Lords, the first of these appeals arises out of an action, referred to by Nourse J. as "the trade marks action" whereby a company incorporated in England sues defendants in tort misfeasance and breach of fiduciary duty. The question is whether the plaintiff company, Williams and Humbert Ltd. ("Williams and Humbert"), is barred from relief in that action because the shares of the Spanish company, Rumasa S.A. ("Rumasa"), which holds all the issued shares of Williams and Humbert have been compulsorily acquired by the Spanish government.

The second of these appeals, arises out of an action referred to as "the banks' action" whereby three companies incorporated in Spain sue defendants in tort and misfeasance. The question is whether the plaintiff companies, Rumasa, Banco de Jerez S.A. ("Jerez") and Banco del Norte S.A. ("Norte"), are barred from relief in that action because all their shares have been compulsorily acquired by the Spanish government.

Nourse J. after hearing arguments which spanned seven working days concluded that the answer was obvious and that the

ownership of the plaintiffs' shares in each action was irrelevant. He, therefore, refused to allow the defendants to plead the compulsory acquisition as a defence. The majority of the Court of Appeal (Fox L.J. and Sir John Megaw) agreed with Nourse J. Lloyd L.J. thought that the problem was more difficult and dissented. The defendants to the actions now appeal to this House, arguing that they are entitled to plead the compulsory acquisition as a defence.

The issued shares of the respondent Rumasa, a company incorporated in Spain, were formerly held by members of the Mateos family. Rumasa was the parent company of a group which included subsidiary companies, some incorporated in Spain and others incorporated outside Spain. Rumasa held all the issued shares in the respondent, Williams and Humbert, incorporated in England and carrying on business as suppliers of sherry under the trade mark "Dry Sack." Rumasa also held a majority of the shares in the respondents Jerez and Norte, both incorporated in Spain and carrying on banking businesses. Thus the Mateos family owned the shares of Rumasa while Rumasa controlled Williams and Humbert, Jerez and Norte.

By a law dated 29 June 1983 enacted by the monarch and parliament of the Kingdom of Spain and taking effect on 30 June 1983, all the issued shares of Rumasa and of the subsidiary companies of Rumasa incorporated in Spain, including the shares of Jerez and Norte, were compulsorily acquired by the Spanish government. By the same law control of the management of Rumasa, Jerez and Norte and the other Spanish subsidiaries of Rumasa, vested in the general board of state ownership. Thus the Spanish government now owns the shares in and controls Rumasa, Jerez and Norte, while Rumasa controls Williams and Humbert.

The reasons advanced by the law dated 29 June 1983 for the compulsory acquisition of the shares in the Spanish companies comprised in the Rumasa group and for the assumption by the government of the management of those companies, were that the Rumasa group had embarked on rash speculations and reckless expansions of credit on a scale which threatened the stability of the Spanish economy, the livelihood of Spanish workers and the savings of bank depositors. The law dated 29 June 1983 provided for the fair price of the shares thereby compulsorily acquired to be paid after a valuation and agreement with the former shareholders or, failing agreement, by a determination of the provincial jury on expropriation of Madrid.

The representatives of the Spanish government now charged with the management of the Rumasa group allege that while the Mateos family controlled Williams and Humbert through Rumasa, the Dry Sack trade mark was improperly diverted from Williams and Humbert to a company incorporated in Jersey and formed for the benefit of the Mateos family. The Spanish government have in the circumstances caused Williams and Humbert, as plaintiffs, to institute the present trade marks action in the Chancery Division of the High Court of Justice of this country against the Jersey company and against members of the Mateos family as defendants, for the recovery of the trade mark and for the payment of damages.

The representatives of the Spanish government now charged with the management of Jerez and Norte allege that while the Mateos family controlled Jerez and Norte, sums amounting to $46 million were improperly diverted from Jerez. The Spanish government have in these circumstances caused Rumasa, Jerez and Norte, as plaintiffs, to institute the banks' action in the Chancery Division against the defendants said to have been responsible for the impropriety. The plaintiffs claim discovery and recovery of the assets now representing the sum of $46 million and damages.

The defendants to the trade marks action and the banks' action are the appellants in these appeals. The appellants deny any impropriety or recklessness in the management of the affairs of the Rumasa group generally or in the management and control of Williams and

Humbert, Jerez and Norte in particular. The appellants now seek to put forward an alternative defence. Even if the appellants, or some of them, have been guilty of misappropriation, breach of trust, misfeasance or other wrongs inflicted on Williams and Humbert or Jerez, nevertheless according to the defence which the appellants now seek to plead, Williams and Humbert as plaintiffs in the trade marks action and Rumasa, Jerez and Norte, as plaintiffs in the banks' action:

"are not entitled to the relief sought or any relief by reason of the fact that the proceedings represent an attempt to enforce a foreign law which is penal or which otherwise ought not to be enforced by this court and further, or alternatively, that it would be contrary to public policy to grant the relief sought or any relief."

This pleading could be justified if English law abhorred the compulsory acquisition legislation of every other country, or if international law abhorred the compulsory acquisition legislation of all countries. But in fact compulsory acquisition is universally recognised and practised. As early as 1789 the Declaration of the Rights of Man, more recently repeated in the French Constitutions of 1946 and 1958, provided that no one should be deprived of property "except in case of evident public necessity legally ascertained and on condition of just indemnity." In the United States the Fifth Amendment to the Constitution of 1791 provided that private property should not "be taken for public use, without just compensation." In modern times written constitutions recognise compulsory acquisition in the public interest subject to the payment of compensation; see, for example, the 1949 Basic Law of the German Federal Republic, the 1949 Constitution of India, the 1969 South American Convention on Human Rights, and the written constitutions of the African states which achieved independence from colonial rule. The United Nations and European Conventions recognise compulsory acquisition in the public interest and in accordance with domestic law and international law. In the United Kingdom, the courts are bound to accept and enforce any compulsory acquisition authorised by the United Kingdom parliament and to recognise compulsory acquisitions by other governments subject only to limitations for the safeguarding of human rights.

There is undoubtedly a domestic and international rule which prevents one sovereign state from changing title to property so long as that property is situate in another state. If the British government purported to acquire compulsorily the railway lines from London to Newhaven and the railway lines from Dieppe to Paris, the ownership of the railway lines situate in England would vest in the British government but the ownership of the railway lines in France would remain undisturbed. But this territorial limitation on compulsory acquisition is not relevant to the acquisition of shares in a company incorporated in the acquiring state. If the British government compulsorily acquired all the shares in a company incorporated in England which owned a railway line between Dieppe and Paris, the ownership of that railway line would remain vested in the company, subject to any exercise by a French government of power compulsorily to acquire the railway line. In the present case, the Spanish government acquired all the shares in Rumasa and Jerez. Ownership of the shares in Williams & Humbert was and remained vested in Rumasa. Ownership of any right of action to recover the Dry Sack trade mark and to recover damages was and remained vested in Williams and Humbert. Ownership of any right of action to recover $46 million was and remained vested in Jerez.

There is another international rule whereby one state will not enforce the revenue and penal laws of another state. This rule with regard to revenue laws may in the future be modified by international convention or by the laws of the European Economic Community in order to prevent fraudulent practices which damage all states and benefit no state. But at present the international rule with regard to the non-enforcement of revenue and penals laws is absolute.

It is, in my view, doubtful whether the Spanish law dated 29 June 1983 can properly

be described as a penal law for present purposes, but in any event the plaintiffs in the trade marks action and the plaintiffs in the banks' action are not seeking to enforce the Spanish law. In the trade marks action the plaintiffs, Williams and Humbert and in the banks' action Rumasa, Jerez and Norte are seeking to enforce English private law which can be invoked, subject to exceptions not here relevant, by a plaintiff of any nationality against any defendant within the jurisdiction and against any property within the jurisdiction. Nourse J., ante, p. 385D-F. succinctly observed that the object of the Spanish law of 29 June 1983

"was to acquire direct ownership and control of Rumasa and the two banks and indirect ownership and control of Williams and Humbert. That object has been duly achieved by perfection of the state's title in Spain. Accordingly, on a simple but compelling view of the matter there is nothing left to enforce."

I agree. An attempt was made to argue that the trade marks action and the banks' action constitute attempts by the Spanish government indirectly to enforce the law dated 29 June 1983 by recovering the Dry Sack trade mark of Williams and Humbert and the $46 million of Jerez for the benefit of the Spanish government. This heretical submission flies in the face of the principle established in Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22 and re-affirmed in E. B. M. Co. Ltd. v. Dominion Bank [1937] 3 All E.R. 555, 564-565 where Lord Russell of Killowen said that it was:

"of supreme importance that the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand and the individual shareholders and their actions assets, rights and liabilities on the other hand."

If the appellants are correct and the trade marks action and the banks' action are attempts indirectly to enforce the Spanish law to which the English courts will not lend their aid, then the practical effect of the Spanish law was to release from liability outside Spain every tortfeasor guilty of inflicting a civil wrong on any company comprised in the Rumasa group and every contracting party who defaulted in his obligations towards any company comprised in the Rumasa group. The Mateos family deny that they unlawfully appropriated the trade mark belonging to Williams and Humbert or unlawfully deprived Jerez of $46 million but if the Mateos family have been guilty of any such wrongdoing, they claim to be released from any liability outside Spain since the passing of the Spanish law which compulsorily acquired all the shares in the Rumasa group. The alleged effect of the Spanish law outside Spain is admitted to apply (if at all) not only in favour of every former shareholder and director but in favour of all persons who incurred liability to the Rumasa group of companies. If an English bank owed $46 million to Jerez on 29 June 1983, no judgment can be obtained or executed for that sum outside Spain. If English sherry clients owe Williams and Humbert <<PoundsSterling>>2 million for sherry purchased before 30 June 1983, then that sherry can now be consumed free of charge. A submission which produces such anarchic results and which releases all wrongdoers from liability must be fallacious. In a brave attempt to make the submission more palatable, Mr. Littman on behalf of the appellants conceded that the trade marks action and the banks' action could be pursued in this country, if and so far as the plaintiffs satisfied the court that they needed to recover their English assets and debts in order to pay creditors. Mr. Littman suggested that any administrative difficulty could be overcome by appointing a receiver charged with ensuring that any assets and debts recovered in an English action were devoted to creditors and that no surplus enured for the indirect benefit of the Spanish government. A receiver can be appointed by the High Court under powers conferred by section 37(1) of the Supreme Court Act 1981 "in all cases in which it appears to the court to be just and convenient to do so." It would, in my opinion, be both unjust and inconvenient for an English court to appoint a receiver of a Spanish company or of an English wholly owned subsidiary of a Spanish company, at considerable expense to

the company, in order to pay the creditors of the Spanish company and to stand possessed of any surplus upon non-existent trusts or upon trust for persons who have never been shareholders of the company or upon trust for former shareholders of a Spanish company who are entitled to receive and may have received compensation in Spain. Mr. Littman did not explain how, if a receiver were appointed, the business of the company could in practice be carried on. On the other hand, Mr. Littman did not suggest that any of the defendants in the trade marks action were entitled under the Companies Act 1948 compulsorily to wind up Williams and Humbert. My Lords, I decline to dine on this curate's egg. The trade marks action and the banks' action must either be wholly good or wholly bad.

If the principles of English domestic law and international law are applied and if the plaintiffs succeed in establishing liability against any of the appellants in tort, misfeasance or breach of fiduciary duty then an English court will grant the appropriate relief. If the Mateos family had remained in charge of the Rumasa group perhaps no action would have been brought by any of the companies comprised in the Rumasa group against the appellants. But that consideration is irrelevant to the actions which have now been brought.

In Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532 the Russian government confiscated a wood factory and stock of wood belonging to the plaintiffs in Russia. The wood was exported to England by the agents of the Russian government and unsuccessfully claimed by the plaintiffs. Bankes L.J. said, at p. 545:

"The court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods."

Scrutton L.J. refused to entertain an argument that the Soviet legislation was confiscatory and unjust saying, at pp. 558-559:

"it appears a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' ... Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right."

Similarly, in Princess Paley Olga v. Weisz [1929] 1 K.B. 718 the plaintiff unsuccessfully sought to recover heirlooms formerly belonging to her in Russia. Russell L.J. said, at p. 736:

"The evidence... clearly establishes a seizure of the property in 1918, either by a section of revolutionaries, whose act was subsequently adopted by the government, or by a usurping power which subsequently became the government. This court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory."

Scrutton L.J. said, at p. 725:

"Our government has recognised the present Russian government as the de jure government of Russia, and our courts are bound to give effect to the laws and acts of that government so far as they relate to property within that jurisdiction when it was affected by those laws and acts."

These authorities illustrate the principle that an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title. The English court will decline to consider the merits of compulsory acquisition. In their pleadings the appellants seek to attack the motives of the Spanish legislators, to allege oppression on the part of the Spanish government and to question the good faith of the Spanish administration in connection with the enactment, terms and implementation of the law of the 29 June

1983. No English judge could properly entertain such an attack launched on a friendly state which will shortly become a fellow member of the European Economic Community.

In Banco de Vizcaya v. Don Alfonso ce Borbon y Austria [1935] 1 K.B. 140 a Spanish decree declared ex-King Alfonso to be guilty of high treason and an outlaw and that all his property within Spain should be seized by the Spanish state for its own benefit. Alfonso had deposited securities in England with an English bank to the order of his Spanish agent. The action was a conflict between principal and agent. Alfonso claimed the securities for himself. His agent claimed the securities for the benefit of the Spanish government. Lawrence J. found for Alfonso on the grounds that the Spanish law was a penal law and that the action involved directly or indirectly the execution of that law. Mr. Littman relied on that decision but, in my opinion, it is only an illustration that the public law of a sovereign state cannot change the title to property which never comes within the jurisdiction of that state.

In Frankfurther v. W. L. Exner Ltd. [1947] Ch. 629, under an Austrian decree directed against Jews, a receiver, one Schober was appointed receiver and manager of the property and business of the plaintiff. The English defendants claimed to set off a debt which they owed to the plaintiff against a debt owed by the receiver to the defendants. Romer J. held that the Austrian decree was a penal law and said, at p. 644:

"It is true that our courts would recognise Schober's title to property in Austria acquired by virtue of the decree, or his rights of control in relation to that property, conferred by that decree, even though such property was subsequently transferred over here; but, in my judgment, Schober would appeal in vain to the courts of this country to assist him in establishing his claim to property which was, and always had been, situate within the jurisdiction."

Mr. Littman sought to rely on this decision but the present case does not involve enforcement of a foreign law which offends principles of human rights or the enforcement of a title to property conferred by Spanish law to property situate in England. The trade marks action and the banks' action are actions by English and Spanish companies to recover property to which, according to their pleadings, they were entitled before the enactment of the Spanish law and to which they remain entitled.

In Bank voor Handel en Scheepvaart N. V. v. Slatford [1953] 1 Q.B. 248 it was argued that the property in England of a Dutch company whose sole shareholder was a Hungarian "belonged to" a Hungarian national for the purposes of the Treaty of Peace (Hungary) Order 1948 (S.I. 1948 No. 116). Devlin J. said, at p. 269:

"The... proposition is that for the purpose of the order property owned by a company belongs to its shareholders, or alternatively is held or managed by the company on behalf of its shareholders. I must say that, if the skilful contentions of the Solicitor-General and Mr. Upjohn had not proved the contrary, I should have thought this proposition beyond the reach of sustained argument. It seems to me to be contrary to all authority and principle."

My Lords, in the present appeals the same observation applies to the skilful contentions of Mr. Littman.

In Governor of India v. Taylor [1955] A.C. 491 an English company carrying on business in India went into voluntary liquidation in England. The Government of India claimed in the winding up for Indian taxes. This House held that the liquidator was neither bound nor entitled to accept the claim. Viscount Simonds cited the observation of Rowlatt J. in King of the Hellenes v. Brostrom (1923) 16 Ll.L.Rep. 190, 193 to the following effect, at p. 503:

"It is perfectly elementary that a foreign government cannot come here - nor will the courts of other countries allow our government to go there - and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to by the country to which he belongs;..."

In the present proceedings the government of Spain are not parties to any action and no

claim for taxes is in issue.

In Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 516 a report of a decision by the courts of Eire, Kingsmill Moore J., sustained by the Supreme Court of Eire, declined to allow the liquidator appointed in Scotland of a company incorporated in Scotland to recover in Eire moneys extracted from the company by the sole owner of the shares in the company. The shareholder had paid off all the creditors of the company except the revenue and in effect closed down the company so that the only persons interested in the assets were the revenue which procured the company to go into liquidation in Scotland and the shareholder, who had followed the surplus assets to Eire. Kingsmill Moore J. said, at p. 529:

"For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction."

Mr. Littman relied heavily on this decision which, he said, applies to the present case because the object of the plaintiffs' in the trademark action and the banks' action is to collect assets which will indirectly enure for the benefit of a foreign government. In my opinion, however, the Buchanan case only concerns a revenue claim.

The principle that a country cannot collect its taxes outside its territories cannot be used to frustrate or contradict the principle that the courts of this country will recognise the law of compulsory acquisition of a foreign country of assets within the foreign country and will accept and enforce the consequences of that compulsory acquisition. The Spanish government has compulsorily acquired the shares in the Spanish companies Rumasa, Jerez and Norte.

An English court, by English law and international law must recognise that Spanish law and accept its consequences. The consequences are that the management of the three Spanish companies and of their Spanish, English and other subsidiaries have passed to representatives of the Spanish government. The consequences are irrelevant to the trade marks action and the banks' action.

Mr. Littman relied on American authorities but they only illustrate the principle that the compulsory acquisition laws of one sovereign state will not change the title to property in another state. In Zwack v. Kraus Bros. & Co. Inc. (1956) 237 F.2d 255 the members of a Hungarian firm registered a trade mark in the United States in the name of an American agent. In 1948 the Hungarian government confiscated the assets of the firm without compensation. The United States Court of Appeal Second Circuit held that the members of the firm were entitled to sue their American agents and to recover the trade mark and damages. Under Hungarian law the firm was regarded as an entity but it was not the equivalent of an American corporation and the United States court treated the firm as a partnership. The decision is no different from that reached in this country in the Banco de Vizcaya case [1935] 1 K.B. 140.

In F. Palicio y Compania S.A. v. Brush (1966) 256 F.Supp. 481 the United States District Court S. D. New York held that the former owners of a business whose assets were acquired by the Cuban government without compensation were not entitled to the price of goods exported from Cuba to the United States by the Cuban government after nationalisation but were entitled to trademarks registered in the United States belonging to the business. The court held, at p. 487, that the former owners were not entitled to the price of goods exported from Cuba because "confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law." The former owners were, however, entitled to the United States trademarks which were situated in the United States and were therefore not affected by the Cuban decree of acquisition.

The United States court recognised the

Cuban law and its change of title to property situate in Cuba but did not recognise or enforce any change of title to property situate in the United States. The decision chose the same approach as that adopted by the English courts in Princess Paley Olga v. Weisz [1929] 1 K.B. 718 and the Banco de Vizcaya case [1935] 1 K.B. 140.

In Oppenheimer v. Cattermole [1976] A.C. 249 a Jew had been deprived of his rights and deprived of his German nationality by Nazi law because of his race. Lord Cross of Chelsea refused to recognise the German law, and said, at pp. 277, 278:

"A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction.... But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."

The views of Lord Cross of Chelsea in that case in relation to a Nazi law which offended human rights are of no assistance to the appellants in the present case which is a simple case of compulsory acquisition.

My Lords, on principle and authority the appellants' attempt to persuade an English court to ignore the effect and consequences of the Spanish law dated 29 June 1983 is misconceived. Nourse J. came to the same conclusion and acceded to an interlocutory application by the plaintiffs in the trade marks action to strike out the appellants' defence so far as it pleaded the Spanish law as a bar to the right of Williams and Humbert to recover its trade mark and struck out the objectionable particulars which impugn the motives, conduct and good faith of the Spanish authorities. The judge also refused the appellants in the banks' action leave to amend their pleadings by including a defence which challenged the effect and consequences of the Spanish law.

The application by the plaintiffs to strike out the offending defence and particulars in the trade marks action was made pursuant to R.S.C., Ord. 18, r. 19, which, so far as material, provides:

"The court may at any stage of the proceedings order to be struck out or amended any pleading... or anything in any pleading... on the ground that - (a) it discloses no reasonable cause of action or defence, as the case may be;..."

The appellants contended that in the circumstances of the present case the application to strike out should have been dismissed and that the appellants should have been allowed to plead the Spanish laws as a bar to the trade marks action and to seek discovery and evidence of their allegations against the conduct of the Spanish authorities.

In Hubbuck & Sons Ltd. v. Wilkinson [1899] 1 Q.B. 86 Sir Nathaniel Lindley M.R. pointed out the distinction between Ord. 18, r. 19 (then Ord. xxv, r. 4), which dealt with striking out and Ord. 33, r. 3 (then Ord. xxv, r. 2), which enables a point of law to be set down and argued as a preliminary issue. He said, at p. 91:

"Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Ord. xxv, r. 2; the other is to apply to strike out the statement of claim under Ord. xxv, r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks."

The observations of Lindley M.R. directed to striking out a statement of claim apply equally to applications to strike out a defence or part of a defence.

There has been recently a difference of judicial approach to the construction of Ord. 18, r. 19. In McKay v. Essex Area Health Authority [1982] Q.B. 1166, the majority of the Court of Appeal (Stephenson and Ackner L.JJ.) cited with approval the observations of Sir Gordon Willmer in Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688, 700 where he said:

"The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result."

On the other hand, Griffiths L.J. dissented on the point in McKay v. Essex Area Health Authority [1982] Q.B. 1166 and said, at p. 1191:

"If on an application to strike out as disclosing no cause of action a judge realises that he cannot brush aside the argument, and can only decide the question after a prolonged and serious legal argument, he should refuse to embark upon that argument and should dismiss the application unless there is a real benefit to the parties in determining the point at that stage. For example, where striking out the cause of action will put an end to the litigation a judge may well be disposed to embark on a substantial hearing because of the possibility of finally disposing of the action. But even in such a case the judge must be on his guard that the facts as they emerge at the trial may not make it easier to resolve the legal question."

My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself. In the present case, the general rule would seem to require a refusal by the judge to embark on the problems of international law involved in the present appeal, leaving those problems to be solved at the trial if they became material. If at the trial the appellants were cleared of any impropriety in their management of the affairs of the Rumasa group, then the problems of international law would not arise. Moreover, even if those problems did arise I do not believe that the length of time, namely seven days, occupied by the judge in deciding to strike out the pleadings would have been added to the time required to decide other issues. But there are special circumstances which, in my view, made it right for the judge to proceed and to make the order which he made. If the appellants' pleadings and particulars had not been struck out, the appellants would have proceeded to demand discovery before trial and to lead evidence at the trial, harassing to the plaintiffs and embarrassing to the court and designed to support the allegations and insinuations of oppression and bad faith on the part of the Spanish authorities which appear in the amended defences and particulars. These allegations are irrelevant to the trade marks action and the banks' action and are inadmissible as a matter of law and comity and were rightly disposed of at the first opportunity.

The appellants complain that nevertheless the application to strike out was misconceived and that it was open to the plaintiffs to apply under Ord. 33, r. 3 for the problems of international law to be resolved without waiting for trial. Ord. 33, r. 3 provides:

"The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

If the question of the applicability of international law and the admissibility of the allegations against the Spanish authorities had been made the subject of an application under Ord. 33, r. 3, the appellants could not have complained. My Lords, I agree and see the force of the argument. The issues raised on these appeals are more appropriate to be decided under Ord. 33, r. 3 than under Ord. 18, r. 19. Nevertheless no harm has been done.

In the Chancery Division the application under Ord. 18, r. 19 was heard in open court. Both parties were well apprised of the serious and lengthy questions involved and were armed with leading counsel and the appropriate authorities. I apprehend that the court would have been warned and a special appointment fixed. In these circumstances the difference between the investigation undertaken by the judge under Ord. 18, r. 19 was no different from the investigation which would have been involved in the trial of an issue under Ord. 33, r. 3. If the application had been started under Ord. 18, r. 19 and the judge had required an alternative application under Ord. 33, r. 3 the time involved would have been the same. The matter having been fully argued before the judge and fully considered both by the Court of Appeal and by your Lordships' House it suffices for me to say that I agree with the conclusions reached by the judge and the majority of the Court of Appeal and would dismiss these appeals with costs.

LORD MACKAY OF CLASHFERN

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Templeman. I agree with the motion he proposes for the disposal of these appeals and I gratefully adopt his account of the facts and his analysis of the authorities to which he has referred.

The appellants' argument in support of the impugned pleadings starts from the rule in Dicey & Morris, The Conflict of Laws, 10th ed. (1980), vol. 1, pp. 89- 90 which states:

"English courts have no jurisdiction to entertain an action: - (1) for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign state; or (2) founded upon an act of state."

The appellants assert that the law dated 29 June 1983 of the Kingdom of Spain by which all the issued shares of Rumasa and of the subsidiary companies of Rumasa incorporated in Spain were compulsorily acquired by the Spanish government, is a penal or other public law of the Kingdom of Spain and that these actions are actions for the indirect enforcement of that law. Even if one assumes the law in question to be within the class to which the appellants seek to ascribe it their pleading discloses a reasonable defence only if the present actions can be described as actions for the enforcement directly or indirectly of that law.

Since the present actions are not expressly founded upon the Spanish law nor do the plaintiffs' claims rely to any extent on the existence or provisions of the law the claim that the present actions are actions for enforcement of the law is at first sight a startling one. The sheet anchor of the submission presented for the appellants to which their counsel repeatedly returned for support of their argument, is Peter Buchanan Ltd. v. McVey (Note) [1955] A.C. 156 which is a decision of Kingsmill Moore J. of the High Court of Eire which was affirmed on appeal by the Supreme Court. The appellants claim that decision was adopted as a correct statement of the law by this House in Government of India v. Taylor [1955] A.C. 491 to which it is appended as a note. The questions raised in Government of India v. Taylor were first, whether there is a rule of law which precludes a foreign state from suing in England for taxes due under the law of that state, and second, whether (assuming the first question to be answered in the affirmative) a claim for foreign taxes is nevertheless "a liability" within the meaning of section 302 of the Companies Act 1948 which the liquidators of a company in liquidation are bound to discharge. After answering the first question in the affirmative and giving his reasons for doing so and before going on to the second question Viscount Simonds said, at p. 508:

"I must add that since writing this part of my opinion I have learned from my noble and learned friend, Lord Keith of Avonholm, that he has discovered a case in the courts of Eire which confirms the view I have expressed."

At p. 509 Lord Morton of Henryton stated that he agreed with the reasoning and conclusion of Viscount Simonds and Lord Reid expressed his concurrence. Lord Keith of Avonholm also concurred and, dealing with the first question that arose for decision said, at pp. 510-511:

"Such additional observations as I make

under this head are due to the fact that I have had access to a judgment delivered by Kingsmill Moore J. in the High Court of Eire on 21 July 1950 in the case of Peter Buchanan Ltd. v. McVey. This admirable judgment, which somehow has escaped the notice of the reporters, covers all the points raised under this head of the appeal and was affirmed by the Irish Court of Appeal on 19 December 1951. It illustrates two propositions: (1) that there are circumstances in which the courts will have regard to the revenue laws of another country; and (2) that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country. We are not concerned to consider in this case the validity of the first proposition or the limits to be put upon it. But it is interesting to notice how it was applied in the case cited. The plaintiff company was a company registered in Scotland which had been put into liquidation by the revenue authorities in Scotland under a compulsory winding up order in respect of a very large claim for excess profits tax and income tax. The liquidator was really a nominee of the revenue. The defendant held 99 one pound shares of the capital of the company and the remaining share was held by a confidential cashier and bookkeeper as trustee for him. These two sole shareholders were also sole directors. The defendant having realised the whole assets of the company in his capacity as a director and having satisfied substantially the whole of the company's indebtedness, other than that due to the revenue, by a variety of devices had the balance transferred to himself to his credit with an Irish bank and decamped to Ireland. The action was in form an action to recover this balance from the defendant at the instance of the company directed by the liquidator. The first answer of the defendant was that, as he had received the money from the company in his capacity as a shareholder in pursuance of an agreement between all the corporators, the company could not now ask to have it back. The judge held that the transaction was a dishonest transaction designed to defeat the claim of the revenue in Scotland as a creditor and was ultra vires of the company and accordingly rejected the defendant's submission. On the other hand, he held that although the action was in form an action by the company to recover these assets it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another State. He accordingly dismissed the action. The judgment contains an able and exhaustive examination of the authorities."

Lord Somervell of Harrow who was the fifth member of the House who took part in the decision does not expressly consider the Buchanan case.

In the Buchanan case Kingsmill Moore J. said, at p. 527:

"Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. There seems to me to be a reasonably close parallel between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the courts of this country, relief cannot be given."

The judge returned to the matter in this way, at p. 529:

"If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinised, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. Mr.

Wilson has pressed upon me the difficulty of deciding such a question of fact and has replied on 'ratio ruentis acervi.' For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction."

Although it does not appear from the report, I understand that during the course of the Irish proceedings, all the trade creditors had been paid off: see Anton, Private International Law (1967), p. 585, note 89.

In Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352 McNair J. concluded that to allow the defendants in that case to set up in diminution or extinction of the plaintiff's claim a foreign garnishee order or attachment served upon them by the Egyptian tax authorities would be contrary to the principle stated in the Buchanan case.

In Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476 this principle was again referred to. In that case while a ship was on the high seas the United States Treasury served a notice of levy in respect of unpaid tax on the shipowners in the United States demanding the surrender of all property in their possession belonging to two United States taxpayers and when the ship docked at Southampton the United States government claimed possession of the goods by virtue of the notice of levy. After referring to Government of India v. Taylor [1955] A.C. 491 and Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352 Lord Denning M.R. went on [1971] 2 Q.B. 476, 482:

"The United States Government submit that that rule only applies to actions in the courts of law by which a foreign government is seeking to collect taxes, and that it does not apply to this procedure by notice of levy, which does not have recourse to the courts. I cannot accept this submission. If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law."

In the course of his argument before this House counsel for the appellants expressly stated that he accepted as correct that expression of opinion by Lord Denning M.R.

From the decision in the Buchanan case [1955] A.C. 516 counsel for the appellants sought to derive a general principle that even when an action is raised at the instance of a legal person distinct from the foreign government and even where the cause of action relied upon does not depend to any extent on the foreign law in question nevertheless if the action is brought at the instigation of the foreign government and the proceeds of the action would be applied by the foreign government for the purposes of a penal revenue or other public law of the foreign State relief cannot be given. It has to be observed that in the Buchanan case the action was being pursued by a person whose title as liquidator of the company depended on his having been appointed by a petition to the court in Scotland on behalf of the Inland Revenue, that the ground of action was that the transactions being attacked in the proceedings in Dublin were ultra vires and dishonest because there existed at the time that they were effected in Scotland a claim by the Inland Revenue which the transactions were designed to defeat, and that if no such claim existed the defendant would have been entitled to retain the subject matter of the claim. Most important there was an outstanding revenue claim in Scotland against the company which the whole proceeds of the action apart from the expenses of the action and the liquidation would be used to meet. No other interest was involved. That this was regarded as of critical importance appears from what was said in the decision on appeal by Maguire C.J., at p. 533.

Having regard to the questions before this House in Government of India v. Taylor [1955] A.C. 491 I consider that it cannot be said that

any approval was given by the House to the decision in the Buchanan case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state. No countenance was given in Government of India v. Taylor, in Rossano's case [1963] 2 Q.B. 352 nor in Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476 to the suggestion that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. The existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle enunciated in the Buchanan case [1955] A.C. 516 for refusing to allow the action to succeed.

In the present case there is no allegation of any unsatisfied claim under the law of the Kingdom of Spain on which counsel for the appellants found. No provision of that law would provide a foundation for making any of the claims in question in the actions with which this appeal is concerned. The decision in the Buchanan case gives no basis for the substitution in place of such an unsatisfied claim, of a general desire on the part of the foreign state to secure a particular result, object or purpose from the enactment of the law. Counsel for the appellants were completely unable to point to any claim unsatisfied under the law of Spain of 29 June on which this aspect of their defence is founded and I consider that it has been clearly demonstrated that it was right for the judge to strike out the pleading which has been impugned in the trademarks action on the ground that it disclosed no reasonable defence and to refuse the proposed amendment in the banks' action on the same ground. Once this conclusion is arrived at I consider that the course taken by the judge under R.S.C., Ord. 18, r. 19 is justified by the terms of that rule.

If on an application to strike out it appears that a prolonged and serious argument will be necessary there must at the least, be a serious risk that the court time, effort and expense devoted to it will be lost since the pleading in question may not be struck out and the whole matter will require to be considered anew at the trial. This consideration, as well as the context in which Ord. 18, r. 19 occurs and the authorities upon it, justifies a general rule that the judge should decline to proceed with the argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that striking out will obviate the necessity for a trial or will so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worth while. I agree with the view that the course taken by the judge in the present case was justified by the very special circumstances to which my noble and learned friend has referred. The fact that at the end of a sustained argument in which other questions were discussed than those which have occupied your Lordships in the four days of the hearing of this appeal in this House he reached a conclusion that the impugned pleading should be struck out in the trade marks action and should not be allowed as an amendment in the banks' action, a decision in which the majority of the Court of Appeal and all your Lordships agree, shows that the judge's exercise of his discretion early in the argument has been shown to be right.

Representation

Solicitors: Denton Hall & Burgin;Herbert Smith & Co.

Appeals dismissed with costs. (J. A. G. R. C. W.)



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